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SECESSION AND
CONSTITUTIONAL LIBERTY

VOLUME II





SECESSION AND CONSTITUTIONAL LIBERTY

*In Which Is Shown the Right of a Nation to Secede from
a Compact of Federation and That Such Right
Is Necessary to Constitutional Liberty
and a Surety of Union*

BY

BUNFORD SAMUEL

Volume II

"If the distribution of power among the several parts of the State is the most efficient restraint on monarchy, the distribution of power among several States is the best check on democracy . . . the protectorate of minorities, and the consecration of self-government. . . . The repentance of the Athenians came too late to save the Republic. But the lesson of their experience endures . . . it teaches that government by the whole people, being the government of the most numerous and most powerful class, is an evil of the same nature as unmixed monarchy, and requires, for nearly the same reasons, institutions that shall protect it against itself, and . . . uphold the permanent reign of law against arbitrary revolutions of opinion."

—LORD ACTON, "Freedom in Antiquity."



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APPENDIX 31

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WHEN Cleinias asks the Athenian, "Can you show that what you have been saying is true?" the latter answers: "To be absolutely sure of the truth of matters concerning which there are many opinions is an attribute of the gods not given to man, O Stranger; but I shall be very happy to tell you what I think, especially as we are now proposing to enter on a discussion concerning laws and constitutions." And Cleinias rejoins: "Your opinion, Stranger, about the questions which are now raised is precisely what we want to hear."

Mr. Madison may fittingly represent Plato's Athenian. From his intimate relation with the Constitution in all its phases,—in the steps leading thereto from the Confederation, in the Federal Convention, in securing its ratification, in interpreting it as Secretary of State and as President, and as its historian,—he is aptly called its Father; and the authority of no individual, as authority, should be more weighty: hence the inquiry here into his opinions at such length. In them lies the crux of the question. Nowhere else has the anti-secession side been so fully stated and developed with so great ability. The preceding part of this inquiry has been but recitation and proof of historical facts necessary to judge the political question here brought to issue. Yet it is proper to remember the Athenian's disclaimer of authority; and that Mr. Madison having so fully stated his reasons, his opinion loses its authority as such,—and is no weightier than the stated reasons therefor.

Forty years after the formation of the Constitution, when South Carolina, seeking to avoid the legalized robbery of the "protective" tariff, prepared to put in force the doctrine of nullification, Mr. Madison, then in extreme age, wrote various papers against that (and the doctrine of secession), as follows:

"Augst. 28, 1830.

"DR. SIR—I have duly recd. your letter in wch. you refer to the 'nullifying doctrine,' advocated as a constitutional right by some of our distinguished fellow citizens; and to the proceedings of the Virga. Legislature in 98 & 99, as appealed to in behalf of that doctrine; and you express a wish for my ideas on those subjects.

"I am aware of the delicacy of the task in some respects; and the difficulty in every respect of doing full justice to it. But having in more than one instance complied with a like request from other friendly quarters, I do not decline a sketch of the views which I have been led to take of the doctrine in question, as well as some others connected with them; and of the grounds from which it appears that the proceedings of Virginia have been misconceived by those who have appealed to them. In order to understand the true character of the Constitution of the U. S. the error, not uncommon, must be avoided, of viewing it through the medium either of a consolidated Government or of a confederated Govt. whilst it is neither the one nor the other, but a mixture of both. And having in no model the similitudes & analogies applicable to other systems of Govt. it must more than any other be its own interpreter, according to its text & *the facts of the case*.

"From these it will be seen that the characteristic peculiarities of the Constitution are 1. The mode of its formation, 2. The division of the supreme powers of Govt. between the States in their united capacity and the States in their individual capacities.

"1. It was formed, not by the Governments of the component States, as the Federal Govt. for which it was substituted was formed; nor was it formed by a majority of the

people of the U. S. as a single community in the manner of a consolidated Government.^{31A}

"It was formed by the States—that is by the people in each of the States, acting in their highest sovereign capacity; and formed, consequently by the same authority which formed the State Constitutions.

"Being thus derived from the same source as the Constitutions of the States, it has within each State, the same authority as the Constitution of the State; and is as much a Constitution, in the strict sense of the term, within its prescribed sphere, as the Constitutions of the States are within their respective sphere; but with this obvious & essential difference, that being a compact among the States in their highest sovereign capacity, and constituting the people thereof one people for certain purposes, it cannot be altered or annulled at the will of the States individually, as the Constitution of a State may be at its individual will.

"2. And that it divides the supreme powers of Govt. between the Govt. of the United States, & the Govts. of the individual States, is stamped on the face of the instrument; the powers of war and of taxation, of commerce & of treaties, and other enumerated powers vested in the Govt. of the U. S. being of as high & sovereign a character as any of the powers reserved to the State Govts.

"Nor is the Govt. of the U. S. created by the Constitution, less a Govt. in the strict sense of the term, within the sphere of its powers, than the Govts. created by the constitutions of the States are within their several spheres. It is like them organized into Legislative, Executive, & Judiciary Departments. It operates like them, directly on persons & things. And, like them, it has at command a physical force for executing the powers committed to it. The concurrent operation in certain cases is one of the features marking the peculiarity of the system.

"Between these different constitutional Govts.—the one operating in all the States, the others operating separately in each, with the aggregate powers of Govt. divided between them, it could not escape attention that controversies would

arise concerning the boundaries of jurisdiction; and that some provision ought to be made for such occurrences. A political system that does not provide for a peaceable & authoritative termination of occurring controversies, would not be more than the shadow of a Govt.; the object & end of a real Govt. being the substitution of law & order for uncertainty confusion, & violence.

"That to have left a final decision in such cases to each of the States, then 13 & already 24, could not fail to make the Constn. & laws of the U. S. different in different States was obvious; and not less obvious, that this diversity of independent decisions, must altogether distract the Govt. of the Union & speedily put an end to the Union itself.^{31B} A uniform authority of the laws, is in itself a vital principle. Some of the most important laws could not be partially executed. They must be executed in all the States or they could be duly executed in none. An impost or an excise, for example, if not in force in some States, would be defeated in others. It is well known that this was among the lessons of experience wch. had a primary influence in bringing about the existing Constitution. A loss of its general authy. would moreover revive the exasperating questions between the States holding ports for foreign commerce and the adjoining States without them, to which are now added all the inland States necessarily carrying on their foreign commerce through other States.

"To have made the decisions under the authority of the individual States, co-ordinate in all cases with decisions under the authority of the U. S. would unavoidably produce collisions incompatible with the peace of society, & with that regular & efficient administration which is the essence of free Govts. Scenes could not be avoided in which a ministerial officer of the U. S. and the correspondent officer of an individual State, would have rencounters in executing conflicting decrees, the result of which would depend on the comparative force of the local posse attending them, and that a casualty depending on the political opinions and party feelings in different States.

"To have referred every clashing decision under the two

authorities for a final decision to the States as parties to the Constitution, would be attended with delays, with inconveniences, and with expenses amounting to a prohibition of the expedient, not to mention its tendency to impair the salutary veneration for a system requiring such frequent interpositions, nor the delicate questions which might present themselves as to the form of stating the appeal, and as to the Quorum for deciding it.

“To have trusted to negociation, for adjusting disputes between the Govt. of the U. S. and the State Govts. as between independent & separate sovereignties, would have lost sight altogether of a Constitution & Govt. for the Union; and opened a direct road from a failure of that resort, to the ultima ratio between nations wholly independent of and alien to each other. If the idea had its origin in the process of adjustment between separate branches of the same Govt. the analogy entirely fails. In the case of disputes between independent parts of the same Govt. neither part being able to consummate its will, nor the Gov. to proceed without a concurrence of the parts, necessity brings about an accommodation. In disputes between a State Govt. and the Govt. of the U. States the case is practically as well as theoretically different; each party possessing all the Departments of an organized Govt. Legisl. Ex. & Judiciary; and having each a physical force to support its pretensions. Although the issue of negociation might sometimes avoid this extremity, how often would it happen among so many States, that an unaccommodating spirit in some would render that resource unavailing? A contrary supposition would not accord with a knowledge of human nature or the evidence of our own political history.

—“The Constitution, not relying on any of the preceding modifications for its safe & successful operation, has expressly declared on the one hand; 1. ‘That the Constitution, and the laws made in pursuance thereof, and all Treaties made under the authority of the U. S. shall be the supreme law of the land; 2. That the judges of every State shall be bound thereby, anything in the Constn. or laws of any State to the contrary not-

withstanding; 3. That the judicial power of the U. S. shall extend to all cases in law & equity arising under the Constitution, the laws of the U. S. and Treaties made under their authority, &c.'

"On the other hand, as a security of the rights & powers of the States in their individual capacities, agst. an undue preponderance of the powers granted to the Government over them in their united capacity, the Constitution has relied on, 1. The responsibility of the Senators and Representatives in the Legislature of the U. S. to the Legislatures & people of the States. 2. The responsibility of the President to the people of the U. States; & 3. The liability of the Ex. and Judiciary functionaries of the U. S. to impeachment by the Representatives of the people of the States, in one branch of the Legislature of the U. S. and trial by the Representatives of the States, in the other branch; the State functionaries, Legislative, Executive, & judiciary, being at the same time in their appointment & responsibility, altogether independent of the agency or authority of the U. States.

"How far this structure of the Govt. of the U. S. be adequate & safe for its objects, time alone can absolutely determine. Experience seems to have shown that whatever may grow out of future stages of our national career, there is as yet a sufficient controul in the popular will over the Executive & Legislative Departments of the Govt. When the Alien & Sedition laws were passed in contravention to the opinions and feelings of the community, the first elections that ensued put an end to them. And whatever may have been the character of other acts in the judgment of many of us, it is but true that they have generally accorded with the views of a majority of the States and of the people. At the present day it seems well understood that the laws which have created most dissatisfaction have had a like sanction without doors; and that whether continued, varied or repealed, a like proof will be given of the sympathy & responsibility of the Representative Body to the Constituent Body. Indeed, the great complaint now is, not against the want of this sympathy and

responsibility, but against the results of them in the legislative policy of the nation.

"With respect to the Judicial power of the U. S. and the authority of the Supreme Court in relation to the boundary of jurisdiction between the Federal & the State Govts. I may be permitted to refer to the [thirty-ninth] number of the 'Federalist' for the light in which the subject was regarded by its writer, at the period when the Constitution was depending; and it is believed that the same was the prevailing view then taken of it, that the same view has continued to prevail; and that it does so at this time notwithstanding the eminent exceptions to it.

"But it is perfectly consistent with the concession of this power to the Supreme Court, in cases falling within the course of its functions, to maintain that the power has not always been rightly exercised. To say nothing of the period, happily a short one, when judges in their seats did not abstain from intemperate & party harangues, equally at variance with their duty and their dignity, there have been occasional decisions from the Bench which have incurred serious & extensive disapprobation. Still it would seem that with but few exceptions, the course of the judiciary has been hitherto sustained by the predominant sense of the nation.

"Those who have denied or doubted the supremacy of the judicial power of the U. S. & denounce at the same time nullifying power in a State, seem not to have sufficiently adverted to the utter inefficiency of a supremacy in a law of the land, without a supremacy in the exposition & execution of the law; nor to the destruction of all equipoise between the Federal Govt. and the State governments, if, whilst the functionaries of the Fedl. Govt. are directly or indirectly elected by and responsible to the States & the functionaries of the States are in their appointments & responsibility wholly independent of the U. S. no constitutional control of any sort belonged to the U. S. over the States. Under such an organization it is evident that it would be in the power of the States individually, to pass unauthorized laws, and to carry them into complete effect, anything in the Constn. and laws of the U. S. to the

contrary notwithstanding. This would be a nullifying power in its plenary character; and whether it had its final effect, thro the Legislative Ex. or Judiciary organ of the State, would be equally fatal to the constitutional relation between the two Govts.

"Should the provisions of the Constitution as here reviewed be found not to secure the Govt. & rights of the States agst. usurpations & abuses on the part of the U. S. the final resort within the purview of the Constn. lies in an amendment of the Constn. according to a process applicable by the States.

"And in the event of a failure of every constitutional resort, and an accumulation of usurpations & abuses, rendering passive obedience & non-resistance a greater evil, than resistance & revolution, there can remain but one resort, the last of all, an appeal from the cancelled obligations of the constitutional compact, to original rights & the law of self-preservation. This is the ultima ratio under all Govt. whether consolidated, confederated, or a compound of both; and it cannot be doubted that a single member of the Union, in the extremity supposed, but in that only would have a right, as an extra & ultra constitutional right, to make the appeal.

"This brings us to the expedient lately advanced, which claims for a single State a right to appeal agst. an exercise of power by the Govt. of the U. S. decided by the State to be unconstitutional, to the parties of the Const. compact; the decision of the State to have the effect of nullifying the act of the Govt. of the U. S. unless the decision of the State be reversed by three-fourths of the parties.

"The distinguished names & high authorities which appear to have asserted and given a practical scope to this doctrine, entitle it to a respect which it might be difficult otherwise to feel for it.

"If the doctrine were to be understood as requiring the three-fourths of the States to sustain, instead of that proportion to reverse, the decision of the appealing State, the decision to be without effect during the appeal, it wd. be sufficient to remark, that this extra constl. course might well give way to that marked out by the Const. which authorizes $\frac{2}{3}$

of the States to institute and $\frac{3}{4}$ to effectuate, an amendment of the Constn. establishing a permanent rule of the highest authy. in place of an irregular precedent of construction only.

"But it is understood that the nullifying doctrine imports that the decision of the State is to be presumed valid, and that it overrules the law of the U. S. unless overruled by $\frac{3}{4}$ of the States.

"Can more be necessary to demonstrate the inadmissibility of such a doctrine than that it puts it in the power of the smallest fraction over $\frac{1}{4}$ of the U. S.—that is, of 7 States out of 24—to give the law and even the Constn. to 17 States, each of the 17 having as parties to the Constn. an equal right with each of the 7 to expound it & to insist on the exposition. That the 7 might, in particular instances be right and the 17 wrong, is more than possible. But to establish a positive & permanent rule giving such a power to such a minority over such a majority, would overturn the first principle of free Govt. and in practice necessarily overturn the Govt. itself.

"It is to be recollected that the Constitution was proposed to the people of the States as a *whole*, and unanimously adopted by the States as a *whole*, it being a part of the Constitution that not less than $\frac{3}{4}$ of the States should be competent to make any alteration in what had been unanimously agreed to. So great is the caution on this point, that in two cases when peculiar interests were at stake, a proportion even of $\frac{3}{4}$ is distrusted, and unanimity required to make an alteration.

"When the Constitution was adopted as a whole, it is certain that there were many parts which if separately proposed, would have been promptly rejected. It is far from impossible, that every part of the Constitution might be rejected by a majority, and yet, taken together as a whole be unanimously accepted. Free constitutions will rarely if ever be formed without reciprocal concessions; without articles conditioned on & balancing each other. Is there a constitution of a single State out of the 24 that wd. bear the experiment of having its component parts submitted to the people & separately decided on?

“What the fate of the Constitution of the U. S. would be if a small proportion of States could expunge parts of it particularly valued by a large majority, can have but one answer.

“The difficulty is not removed by limiting the doctrine to cases of construction. How many cases of that sort, involving cardinal provisions of the Constitution, have occurred? How many now exist? How many may hereafter spring up? How many might be ingeniously created, if entitled to the privilege of a decision in the mode proposed?

“Is it certain that the principle of that mode wd. not reach farther than is contemplated? If a single State can of right require—of its co-States to overrule its exposition of the Constitution, because that proportion is authorized to amend it, would the plea be less plausible that, as the Constitution was unanimously established, it ought to be unanimously expounded?

“The reply to all such suggestions seems to be unavoidable and irresistible, that the Constitution is a compact; that its text is to be expounded according to the provision for expounding it, making a part of the compact; and that none of the parties can rightfully renounce the expounding provision more than any other part. When such a right accrues, as it may accrue, it must grow out of abuses of the compact releasing the sufferers from their fealty to it.

“In favour of the nullifying claim for the States individually, it appears, as you observe, that the proceedings of the Legislature of Virga. in 98 & 99 agst. the Alien and Sedition Acts are much dwelt upon.

“It may often happen, as experience proves, that erroneous constructions, not anticipated, may not be sufficiently guarded against in the language used; and it is due to the distinguished individuals who have misconceived the intention of those proceedings to suppose that the meaning of the Legislature, though well comprehended at the time, may not now be obvious to those unacquainted with the contemporary indications and impressions.

“But it is believed that by keeping in view the distinction between the Govt. of the States & the States in the sense in

which they were parties to the Constn.; between the rights of the parties, in their concurrent and in their individual capacities; between the several modes and objects of interposition agst. the abuses of power, and especially between interpositions within the purview of the Constn. & interpositions appealing from the Constn. to the rights of nature paramount to all Constitutions; with these distinctions kept in view, and an attention, always of explanatory use, to the views & arguments which were combated, a confidence is felt, that the Resolutions of Virginia, as vindicated in the Report on them, will be found entitled to an exposition, showing a consistency in their parts and an inconsistency of the whole with the doctrine under consideration.

“That the Legislature cd. not have intended to sanction such a doctrine is to be inferred from the debates in the House of Delegates, and from the address of the two Houses to their constituents on the subject of the resolutions. The tenor of the debates wch. were ably conducted and are understood to have been revised for the press by most, if not all, of the speakers, discloses no reference whatever to a constitutional right in an individual State to arrest by force the operation of a law of the U. S. Concert among the States for redress against the alien & sedition laws, as acts of usurped power, was a leading sentiment, and the attainment of a concert the immediate object of the course adopted by the Legislature, which was that of inviting the other States ‘to *concur* in declaring the act to be unconstitutional, and to *co-operate* by the necessary & proper measures in maintaining unimpaired the authorities’ rights & liberties reserved to the States respectively & to the people.’ That by the necessary and proper measures to be *concurrently* and co-operatively taken, were meant measures known to the Constitution, particularly the ordinary controul of the people and Legislatures of the States over the Govt. of the U. S. cannot be doubted; and the interposition of this controul as the event showed was equal to the occasion.

“It is worthy of remark, and explanatory of the intentions of the Legislature, that the words ‘not law, but utterly null,

void, and of no force or effect,' which had followed, in one of the Resolutions, the word 'unconstitutional,' were struck out by common consent. Tho the words were in fact but synonymous with 'unconstitutional,' yet to guard against a misunderstanding of this phrase as more than declaratory of opinion, the word unconstitutional alone was retained, as not liable to that danger.

"The published address of the Legislature to the people their constituents affords another conclusive evidence of its views. The address warns them against the encroaching spirit of the Genl. Govt., argues the unconstitutionality of the alien & sedition acts, points to other instances in which the constl. limits had been overleaped; dwells upon the dangerous mode of deriving power by implications; and in general presses the necessity of watching over the consolidating tendency of the Fedl. policy. But nothing is sd. that can be understood to look to means of maintaining the rights of the States beyond the regular ones within the forms of the Constn.

"If any farther lights on the subject cd. be needed, a very strong one is reflected in the answers to the Resolutions by the States which protested agst. them. The main objection to these, beyond a few general complaints agst. the inflammatory tendency of the resolutions was directed agst. the assumed authy. of a State Legisle. to declare a law of the U. S. unconstitutional, which they pronounced an unwarrantable interference with the exclusive jurisdiction of the Supreme Ct. of the U. S. Had the resolns. been regarded as avowing & maintaining a right in an indivl. State, to arrest by force the execution of a law of the U. S. it must be presumed that it wd. have been a conspicuous object of their denunciation." (Letter to Edward Everett. Hunt's Edition of Madison's Writings, 9: 383-403.)

"I recd. in due time your favor enclosing your two late speeches, and requesting my views of the subject they discuss. The speeches could not be read without leaving a strong impression of the ability & eloquence which have justly called forth the eulogies of the public. But there are doctrines

espoused in them from which I am constrained to dissent. I allude particularly to the doctrine which I understand to assert that the States perhaps their Governments have, singly, a constitutional right to resist & by force annul within itself acts of the Government of the U. S. which it deems unauthorized by the Constitution of the U. S.; although such acts be not within the extreme cases of oppression, which justly absolve the State from the Constitutional compact to which it is a party.

"It appears to me that in deciding on the character of the Constitution of the U. S. it is not sufficiently kept in view that being an unprecedented modification of the powers of Govt. it must not be looked at thro' the refracting medium either of a consolidated Government, or of a confederated Govt.; that being essentially different from both, it must be its own interpreter according to its text and *the facts of the case*.

"Its characteristic peculiarities are 1. the mode of its formation. 2. its division of the supreme powers of Govt. between the States in their united capacity, and the States in their individual capacities.

"1. It was formed not by the Governments of the States as the Federal Government superseded by it was formed; nor by a majority of the people of the U. S. as a single Community, in the manner of a consolidated Government.

"It was formed by the States, that is by the people of each State, acting in their highest sovereign capacity thro' Conventions representing them in that capacity, in like manner and by the same authority as the State Constitutions were formed; with this characteristic & essential difference that the Constitution of the U. S. being a compact among the States that is the people thereof making them the parties to the compact over one people for specified objects cannot be revoked or changed at the will of any State within its limits as the Constitution of a State may be changed at the will of the State, that is the people who compose the State & are the parties to its constitution & retained their powers over it. The idea of a compact between the Governors & the Governed was exploded

with the Royal doctrine that Government was held by some tenure independent of the people.

"The Constitution of the U. S. is therefore within its prescribed sphere a Constitution in as strict a sense of the term as are the Constitutions of the individual States, within their respective spheres.

"2. And that it divides the supreme powers of Govt. between the two Governments is seen on the face of it; the powers of war & taxation, that is of the sword & the purse, of commerce of treaties &c. vested in the Govt. of the U. S. being of as high a character as any of the powers reserved to the State Govts.

"If we advert to the Govt. of the U. S. as created by the Constitution it is found also to be a Govt. in as strict a sense of the term, within the sphere of its powers, as the Govts. created by the Constitutions of the States are within their respective spheres. It is like them organized into a Legislative, Executive & Judicial Dept. It has, like them, acknowledged cases in which the powers of those Departments are to operate and the operation is to be the same in both; that is *directly* on the persons & things submitted to their power. The concurrent operation in certain cases is one of the features constituting the peculiarity of the system.

"Between these two Constitutional Govts., the one operating in all the States, the others operating in each respectively; with the aggregate powers of Govt. divided between them, it could not escape attention, that controversies concerning the boundary of Jurisdiction would arise, and that without some adequate provision for deciding them, conflicts of physical force might ensue. A political system that does not provide for a peaceable & authoritative termination of occurring controversies, can be but the name & shadow of a Govt. the very object and end of a real Govt. being the substitution of law & order for uncertainty confusion & violence.

"That a final decision of such controversies, if left to each of 13 States now 24 with a prospective increase, would make the Constitution & laws of the U. S. different in different States, was obvious; and equally obvious that this diversity

of independent decisions must disorganize the Government of the Union, and even decompose the Union itself.

"Against such fatal consequences the Constitution undertakes to guard 1. by declaring that the Constitution & laws of the States in their united capacity shall have effect, anything in the Constitution or laws of any State in its individual capacity to the contrary notwithstanding, by giving to the Judicial authority of the U. S. an appellate supremacy in all cases arising under the Constitution, & within the course of its functions, arrangements supposed to be justified by the necessity of the case; and by the agency of the people & Legislatures of the States in electing & appointing the Functionaries of the Common Govt. whilst no corresponding relation existed between the latter and the Functionaries of the States.

"2. Should these provisions be found notwithstanding the responsibility of the functionaries of the Govt. of the U. S. to the Legislatures & people of the States not to secure the State Govts. against usurpations of the Govt. of the United States there remains within the purview of the Constn. an impeachment of the Executive & Judicial Functionaries, in case of their participation in the guilt, the prosecution to depend on the Representatives of the people in one branch, and the trial on the Representatives of the States in the other branch of the Govt. of the U. S.

"3. The last resort within the purview of the Constn. is the process of amendment provided for by itself and to be executed by the States.

"Whether these provisions taken together be the best that might have been made; and if not, what are the improvements, that ought to be introduced, are questions altogether distinct from the object presented by your communication, which relates to the Constitution as it stands.

"In the event of a failure of all these Constitutional resorts against usurpations and abuses of power and of an accumulation thereof rendering passive obedience & nonresistance a greater evil than resistance and revolution, there can remain but one resort, the last of all, the appeal from the cancelled obligation of the Constitutional compact to original

rights and the law of self-preservation. This is the *Ultima ratio*, under all Governments, whether consolidated, confederated, or partaking of both those characters. Nor can it be doubted that in such an extremity a single State would have a right, tho' it would be a natural not a *constitutional* Right to make the appeal. The same may be said indeed of particular portions of any political community whatever so oppressed as to be driven to a choice between the alternative evils.

"The proceedings of the Virginia Legislature (occasioned by the Alien and Sedition Acts) in which I had a participation, have been understood it appears, as asserting a Constitutional right in a single State to nullify laws of the U. S. that is to resist and prevent by force the execution of them, within the State.

"It is due to the distinguished names who have given that construction of the Resolutions and the Report on them to suppose that the meaning of the Legislature though expressed with a discrimination and fulness sufficient at the time may have been somewhat obscured by an oblivion of contemporary indications and impressions. But it is believed that by keeping in view distinctions (an inattention to which is often observable in the ablest discussions of the subjects embraced in those proceedings) between the Governments of the States & the States in the sense in which they were parties to the Constitution; between the several modes and objects of interposition agst. the abuses of Power; and more especially between interpositions within the purview of the Constitution, and interpositions appealing from the Constitution to the rights of nature, paramount to all Constitutions; with these distinctions kept in view, and an attention always of explanatory use to the views and arguments which are combated, a confidence is felt that the Resolutions of Virga. as vindicated in the Report on them, are entitled to an exposition shewing a consistency in their parts, and an inconsistency of the whole with the doctrine under consideration.

"On recurring to the printed Debates in the House of Delegates on the occasion, which were ably conducted, and are understood to have been, for the most part at least, revised

by the Speakers, the tenor of them does not disclose any reference to a constitutional right in an individual State to arrest by force the operation of a law of the U. S. Concert among the States for redress agst. the Alien and Sedition laws as acts of usurped power, was a leading sentiment, and the attainment of a Concert the immediate object of the course adopted, which was an invitation to the other States 'to *concur* in declaring the acts to be unconstitutional, and to *co-operate* by the necessary & proper measures in maintaining unimpaired the authorities' rights and liberties reserved to the States respectively or to the people.' That by the necessary & proper measures to be concurrently & co-operatively taken were meant measures known to the Constitution, particularly the control of the Legislatures and people of the States over the Cong. of the U. S. cannot well be doubted.

"It is worthy of remark, and explanatory of the intentions of the Legislature, that the words '*and not law, but utterly null void & of no power or effect*' which in the Resolutions before the House followed the word unconstitutional, were near the close of the debate stricken out by common consent. It appears that the words had been regarded as only surplusage by the friends of the Resolution; but lest they should be misconstrued into a nullifying import instead of a declaration of opinion, the word unconstitutional alone was retained, as more safe agst. that error. The term *nullification* to which such an important meaning is now attached, was never a part of the Resolutions and appears not to have been contained in the Kentucky Resolutions as *originally* passed, but to have been introduced at an after date.

"Another and still more conclusive evidence of the intentions of the Legislature is given in their Address to their Constituents accompanyg. the publication of their Resoln. The address warns them agst. the encroaching spirit of the Gen. Govt.; argues the unconstitutionality of the Alien & Sedition laws; enumerates the other instances in which the Constitutional limits had been overleaped; dwells on the dangerous mode of deriving power by implication; and in general presses the necessity of watching over the consolidating tendency of

the Fedr. policy. But nothing is said that can be understood to look to means of maintaining the rights of the States beyond the regular ones within the forms of the Constitution.

"If any further lights on the subject could be needed a very strong one is reflected from the answers given to the Resolutions by the States who protested agst. them. Their great objection, with a few undefined complaints of the spirit & character of the Resolutions, was directed agst. the assumed authority of a State Legislature to declare a law of the U. S. to be unconstitutional which they considered an unwarrantable interference with the exclusive jurisdiction of the Supreme Court of the U. S. Had the Resolutions been regarded as avowing & maintaining a right in an individual State to arrest by force the execution of a law of the U. S. it must be presumed that it would have been a pointed and conspicuous object of their denunciation.

"In this review I have not noticed the idea entertained by some that disputes between the Govt. of the U. S. and those of the individual States may & must be adjusted by negotiation, as between independent Powers.

"Such a mode as the only one of deciding such disputes would seem to be as expressly at variance with the language and provisions of the Constitution as in a practical view it is pregnant with consequences subversive of the Constitution. It may have originated in a supposed analogy to the negotiating process in cases of disputes between separate branches or Departments of the same Govt.; but the analogy does not exist. In the case of disputes between independent parts of the same Govt. neither of them being able to consummate its pretensions, nor the Govt. to proceed without a co-operation of the several parts necessity brings about an adjustment. In disputes between a State Govt. and the Govt. of the U. S. the case is both theoretically & practically different; each party possessing all the Departments of an organized Government. Legislative Ex. & Judl.; and having each a physical force at command.

"This idea of an absolute separation & independence between the Govt. of the U. S. and the State Govts. as if they

belonged to different nations alien to each other has too often tainted the reasoning applied to Constitutional questions. Another idea not less unsound and sometimes presenting itself is, that a cession of any part of the rights of sovereignty is inconsistent with the nature of sovereignty, or at least a degradation of it. This would certainly be the case if the cession was not both mutual & equal, but when there is both mutuality & equality there is no real sacrifice on either side, each gaining as much as it grants, and the only point to be considered is the expediency of the compact and that to be sure is a point that ought to be well considered. On this principle it is that Treaties are admissible between Independent powers, wholly alien to each other, although privileges may be granted by each of the parties at the expense of its internal jurisdiction. On the same principle it is that individuals entering into the social State surrender a portion of their equal rights as men. If a part only made the surrender, it would be a degradation; but the surrender being mutual, and each gaining as much authority over others as is granted to others over him, the inference is mathematical that in theory nothing is lost by any; however different the result may be in practice.

"I am now brought to the proposal which claims for the States respectively a right to appeal agst. an exercise of power by the Govt. of the U. S. which by the States is decided to be unconstitutional, to a final decision by—of the parties to the Constitution. With every disposition to take the most favorable view of this expedient that a high respect for its Patrons could prompt I am compelled to say that it appears to be either not necessary or inadmissible.

"I take for granted it is not meant that pending the appeal the offensive law of the U. S. is to be suspended within the State. Such an effect would necessarily arrest its operation everywhere, a uniformity in the operation of laws of the U. S. being indispensable not only in a Constitutional and equitable, but in most cases in a practicable point of view, and a final decision adverse to that of the Appellant State would afford grounds to all kinds of complaint which need not be traced.

"But aside from these considerations, it is to be observed that the effect of the appeal will depend wholly on the form in which the case is proposed to the Tribunal which is to decide it.

"If—of the States can sustain the State in its decision it would seem that this extra constitutional course of proceeding might well be spared; inasmuch as—can institute and—can effectuate an amendment of the Constitution, which would establish a permanent rule of the highest authority, instead of a precedent of construction only.

"If on the other hand—are required to reverse the decision of the State it will then be in the power of the smallest fraction over—(of 7 States for example out of 24) to give the law to 17 States, each of the 17 having as parties to the Constitutional compact an equal right with each of the 7 to expound & insist on its exposition. That the 7 might in particular cases be right and the 17 wrong, is quite possible. But to establish a positive & permanent rule giving such a power to such a minority, over such a majority, would overturn the first principle of a free Government and in practice could not fail to overturn the Govt. itself.

"It must be recollected that the Constitution was proposed to the people of the States as a *whole*, and unanimously adopted as a *whole*, it being a part of the Constitution that not less than—should be competent to make any alteration in what had been unanimously agreed to. So great is the caution on this point, that in two cases where peculiar interests were at stake a majority even of—are distrusted and a unanimity required to make any change affecting those cases.

"When the Constitution was adopted as a whole, it is certain that there are many of its parts which if proposed by themselves would have been promptly rejected. It is far from impossible that every part of a whole would be rejected by a majority and yet the whole be unanimously accepted. Constitutions will rarely, probably never be formed without mutual concessions, without articles conditioned on & balancing each other. Is there a Constitution of a single State out of the 24 that would bear the experiment of having its component

parts submitted to the people separately, and decided on according to their insulated merits?

"What the fate of the Constitution of the U. S. would be if a few States could expunge parts of it most valued by the great majority, and without which the great majority would never have agreed to it, can have but one answer.

"The difficulty is not removed by limiting the process to cases of construction. How many cases of that sort involving vital texts of the Constitution, have occurred? How many now exist? How many may hereafter spring up? How many might be plausibly enacted, if entitled to the privilege of a decision in the mode proposed.

"Is it certain that the principle of that mode may not reach much farther than is contemplated? If a single State can of right require—of its Co-States to overrule its exposition of the Constitution, because that proportion is authorized to amend it, is the plea less plausible that as the Constitution was unanimously formed it ought to be unanimously expounded?

"The reply to all such suggestions must be that the Constitution is a compact; that its text is to be expounded according to the provision for it making part of that Compact; and that none of the parties can rightfully violate the expounding provision, more than any other part. When such a right accrues as may be the case, it must grow out of abuses of the Constitution amounting to a release of the sufferers from their allegiance to it.

"Will you permit me Sir to refer you to Nos. 39 & 44 of the 'Federalist,' edited at Washington by Gideon, which will shew the views taken on some points of the Constitution at the period of its adoption. I refer to that Edition because none preceding it are without errors in the names prefixed to the several papers as happens to be the case in No. 51 for which you suppose Col. Hamilton to be responsible. The errors were occasioned by a memorandum of his penned probably in haste, & partly in a lumping way. It need not be remarked that they were pure inadvertences.

"I fear Sir I have written you a letter the length of which may accord as little with your patience, as I am sorry to fore-

see that the scope of parts of it must do with your judgment. But a naked opinion did not appear respectful either to the subject or to the request with which you honored me, and notwithstanding the latitude given to my pen, I am not unaware that the views it presents may need more of development in some instances, if not more exactness of discrimination in others, than I could bestow on them. The subject has been so expanded and recd. such ramifications & refinements, that a full survey of it is a task agst. which my age alone might justly warn me." *

"The compound Govt. of the U. S. is without a model, and to be explained by itself, not by similitudes or analogies. The terms Union, Federal, National not to be applied to it without the qualifications peculiar to the system. The English Govt. is in a great measure *sui generis*, and the terms Monarchy used by those who look at the executive head only, and Commonwealth, by those looking at the representative member chiefly, are inapplicable in a strict sense.

"A fundamental error lies in supposing the State Governments to be the parties to the Constitutional compact from which the Govt. of the U. S. results.

"It is a like error that makes the General Govt. and the State governments the parties to the compact, as stated in the 4th letter of 'Algernon Sidney,' [Judge Roane]. They may be parties in a judicial controversy, but are not so in relation to the original constitutional compact.

"In No. XI of 'Retrospects,' [by Govr. Giles], in the Richmond *Enquirer* of Sept. 8, 1829, Mr. Jefferson is misconstrued, or rather *mistated*, as making the State Govts. & the Govt. of the U. S. *foreign* to each other; the evident meaning, or rather the express language of Mr. J. being 'the *States* are foreign to each other, in the portions of sovereignty not granted, as they were in the entire sovereignty before the grant,' and not that the State Govts. and the Govt. of the U. S. are foreign to each other. As the State Govts. participate in appointing the Functionaries of the Genl. Govt. it can no more

* Madison's letter to Robert Y. Hayne, April 3d or 4th, 1830, Hunt's edition of "Madison's Writings," Vol. IX, pp. 383-394.

be said that they are altogether foreign to each other, than that the people of a State & its Govt. are foreign.

"The real parties to the constl. compact of the U. S. are the *States*—that is, the people thereof respectively in their sovereign character, and they *alone*, so declared in the Resolutions of 98, and so explained in the Report of 99. In these Resolutions as originally proposed, the word *alone*, wch. guarded agst. error on this point, was struck out, [see printed debates of 98] and led to misconceptions & misreasonings concerning the true character of the pol. system, and to the idea that it was a compact between the Govts. of the States and the Govt. of the U. S. an idea promoted by the familiar one applied to Govts. independent of the people, particularly the British, of [?] a compact between the monarch & his subjects, pledging protection on one side & allegiance on the other.

"The plain fact of the case is that the Constitution of the U. S. was created by the people composing the respective States, who alone had the right; that they organized the Govt. into Legis. Ex. & Judiciary. deputed. delegating thereto certain portions of power to be exercised over the whole, and reserving the other portions to themselves respectively. As these distinct portions of power were to be exercised by the General Govt. & by the State Govts.; by each within limited spheres; and as of course controversies concerning the boundaries of their power wd. happen, it was provided that they should be decided by the Supreme Court of the U. S. so constituted as to be as impartial as it could be made by the mode of appointment & responsibility for the Judges.

"Is there then no remedy for usurpations in which the Supreme Ct. of the U. S. concur? Yes: constitutional remedies such as have been found effectual; particularly in the case of alien & sedition laws, and such as will in all cases be effectual, whilst the responsibility of the Genl. Govt. to its constituents continues:—Remonstrances & instructions—recurring elections & impeachments; amendt. of Const. as provided by itself & exemplified in the 11th article limiting the suability of the States.

"These are resources of the States agst. the Genl. Govt.: re-

sulting from the relations of the States to that Govt.: whilst no corresponding controul exists in the relations of the Genl. to the individual Govts. all of whose functionaries are independent of the United States in their appt. and responsibility.

"Finally should all the constitutional remedies fail, and the usurpations of the Genl. Govt. become so intolerable as absolutely to forbid a longer passive obedience & non-resistance, a resort to the original rights of the parties becomes justifiable; and redress may be sought by shaking off the yoke, as of right, might be done by part of an individual State in a like case; or even by a single citizen, could he effect it, if deprived of rights absolutely essential to his safety & happiness. In the defect of their ability to resist, the individual citizen may seek relief in expatriation or voluntary exile a resort not within the reach of large portions of the community.

"In all the views that may be taken of questions between the State Govts. & the Genl. Govt. the awful consequences of a final rupture & dissolution of the Union shd. never for a moment be lost sight of. Such a prospect must be deprecated, must be shuddered at by every friend to his country, to liberty, to the happiness of man. For, in the event of a dissolution of the Union, an impossibility of ever renewing it is brought home to every mind by the difficulties encountered in establishing it. The propensity of all communities to divide when not pressed into a unity by external danger, is a truth well understood. *There is no instance of a people inhabiting even a small island, if remote from foreign danger, and sometimes in spite of that pressure, who are not divided into alien, rival, hostile tribes.* The happy Union of these States is a wonder; their Constn. a miracle; their example the hope of Liberty throughout the world. Woe to the ambition that would meditate the destruction of either!" (Madison's MSS. Sepr. 1829. Hunt's Edition, 9:351-357.)

"Would it be impossible so to remould the Essay as to drop what might be offensive to the opponents of the necessary power of the Supreme Court of the U. States, but who are sound as to the Tariff power; retaining only what relates to the Tariff; or, at most, to the disorganizing doctrine which as-

serts a right in every State to withdraw itself from the Union. Were this a mere league, each of the parties would have an equal right to expound it; and of course, there would be as much right in one to insist on the bargain, as in another to renounce it. But the Union of the States is, according to the Virga. doctrine in 98-99, a *Constitutional Union*; and the right to judge *in the last resort*, concerning usurpations of power, affecting the validity of the Union, referred by that doctrine to the parties to the compact. On recurring to original principles, and to extreme cases, a single State might indeed be so oppressed as to be justified in shaking off the yoke; so might a single county of a State be, under an extremity of oppression. But until such justifications can be pleaded, the compact is obligatory in both cases. It may be difficult to do full justice to this branch of the subject, without involving the question between the State and Federal Judiciaries: But I am not sure that the plan of your pamphlet will not admit a separation. On this supposition, it might be well, as soon as the Tariff fever shall have spent itself, to take up both the Judicial & the anti-union heresies; on each of which you will have a field for instructive investigation, with the advantage of properly connecting them in their bearings. A political system that does not provide for a peaceable and effectual decision of all controversies arising among the parties is not a Government, but a mere Treaty between independent nations, without any resort for terminating disputes but negotiation, and that failing, the sword. That the system of the U. States, is what it professes to be, a real Governmt. and not a nominal one only, is proved by the fact that it has all the practical attributes & organs of a real tho' limited Govt.; a Legislative, Executive, & Judicial Department, with the physical means of executing the particular authorities assigned to it, on the individual citizens, in like manner as is done by other Governmts. Those who would substitute negociation for Governmental authority, and rely on the former as an adequate resource, forget the essential difference between disputes to be settled by two Branches of the same Govt. as between the House of Lords & Commons in England, or the Senate & H. of Representatives here; and

disputes between different Govts. In the former case, as neither party can act without the other, necessity produces an adjustment. In the other case, each party having in a Legislative, Executive, & Judicial Department of its own, the compleat means of giving an independent effect to its will, no such necessity exists; and physical collisions are the natural result of conflicting pretensions. . . .

"Note that there can of course be no regular Arbiter or Umpire, under any Governmental system, applicable to those extreme cases, or questions of passive obedience & non-resistance, which justify & require a resort to the original rights of the parties to the system or compact; but that in all cases not of that extreme character, there is & must be an Arbiter or Umpire in the constitutional authority provided for deciding questions concerning the boundaries of right & power. The particular provision, in the Constitution of the U. S. is in the authority of the Supreme Court, as stated in the 'Federalist,' No. 39." Madison's Letter to Joseph C. Cabell, Sept. 7, 1829. Hunt's Edition, 9:347-351.

"The letter to Trist was dated February 15, 1830.

"It has been too much the case in expounding the Constitution of the U. S. that its meaning has been sought not in its peculiar and unprecedented modifications of Power; but by viewing it, some through the medium of a simple Govt. others thro' that of a mere League of Govts. It is neither the one nor the other; but essentially different from both. It must consequently be its own interpreter. No other Government can furnish a key to its true character. Other Governments present an individual & indivisible sovereignty. The Constitution of the U. S. divides the sovereignty; the portions surrendered by the States, composing the Federal sovereignty over specified subjects; the portions retained forming the sovereignty of each over the residuary subjects within its sphere. If sovereignty cannot be thus divided, the Political System of the United States is a chimaera, mocking the vain pretensions of human wisdom. If it can be so divided, the system ought to

have a fair opportunity of fulfilling the wishes & expectations which cling to the experiment.

"Nothing can be more clear than that the Constitution of the U. S. has created a Government, in as strict a sense of the term, as the Governments of the States created by their respective Constitutions. The Federal Govt. has like the State Govts. its Legislative, its Executive & its Judiciary Departments. It has, like them, acknowledged cases in which the powers of these departments are to operate. And the operation is to be directly on persons & things in the one Govt. as in the others. If in some cases, the jurisdiction is concurrent as it is in others exclusive, this is one of the features constituting the peculiarity of the system.

"In forming this compound scheme of Government it was impossible to lose sight of the question, what was to be done in the event of controversies which could not fail to occur, concerning the partition line, between the powers belonging to the Federal and to the State Govts. That some provision ought to be made, was as obvious and as essential, as the task itself was difficult and delicate.

"That the final decision of such controversies, if left to each of the 13 now 24 members of the Union, must produce a different Constitution & different laws in the States was certain; and that such differences must be destructive of the common Govt. & of the Union itself, was equally certain. The decision of questions between the common agents of the whole & of the parts, could only proceed from the whole, that is from a collective not a separate authority of the parts.

"The question then presenting itself could only relate to the least objectionable mode of providing for such occurrences, under the collective authority.

"The provision immediately and ordinarily relied on, is manifestly the Supreme Court of the U. S., clothed as it is, with a Jurisdiction 'in controversies to which the U. S. shall be a party;' the Court itself being so constituted as to render it independent & impartial in its decisions; [see 'Federalist,' No. 39, p. 241] whilst other and ulterior resorts would remain in the elective process, in the hands of the people themselves

the joint constituents of the parties; and in the provision made by the Constitution for amending itself. All other resorts are extra & ultra constitutional, corresponding to the *Ultima Ratio* of nations renouncing the ordinary relations of peace.

"If the Supreme Court of the U. S. be found or deemed not sufficiently independent and impartial for the trust committed to it, a better Tribunal is a desideratum: But whatever this may be, it must necessarily derive its authority from the whole not from the parts, from the States in some collective not individual capacity. And as some such Tribunal is a vital element, a *sine qua non*, in an efficient & permanent Govt. the Tribunal existing must be acquiesced in, until a better or more satisfactory one can be substituted.

"Altho' the old idea of a compact between the Govt. & the people be justly exploded, the idea of a compact among those who are parties to a Govt. is a fundamental principle of free Govt.

"The original compact is the one implied or presumed, but nowhere reduced to writing, by which a people agree to form one society. The next is a compact, here for the first time reduced to writing, by which the people in their social state agree to a Govt. over them. These two compacts may be considered as blended in the Constitution of the U. S., which recognises a union or society of States, and makes it the basis of the Govt. formed by the parties to it.

"It is the nature & essence of a compact that it is equally obligatory on the parties to it, and of course that no one of them can be liberated therefrom without the consent of the others, or such a violation or abuse of it by the others, as will amount to a dissolution of the compact.

"Applying this view of the subject to a single community, it results, that the compact being between the individuals composing it, no individual or set of individuals can at pleasure, break off and set up for themselves, without such a violation of the compact as absolves them from its obligations.* It follows at the same time that, in the event of such a violation, the

* Mr. Madison throughout these papers occasionally confuses the "natural," or, as I should prefer to term it, the "moral," right of resistance with the constitutional right of secession.

suffering party rather than longer yield a passive obedience may justly shake off the yoke, and can only be restrained from the attempt by a want of physical strength for the purpose. The case of individuals expatriating themselves, that is leaving their country in its *territorial* as well as its social & political sense, may well be deemed a reasonable privilege, or rather as a right impliedly reserved. And even in this case equitable conditions have been annexed to the right which qualify the exercise of it.

“Applying a like view of the subject to the case of the U. S. it results, that the compact being among individuals as embodied into States, no State can at pleasure release itself therefrom, and set up for itself. The compact can only be dissolved by the consent of the other parties, or by usurpations or abuses of power justly having that effect. It will hardly be contended that there is anything in the terms or nature of the compact, authorizing a party to dissolve it at pleasure.

“It is indeed inseparable from the nature of a compact, that there is as much right on one side to expound it & to insist on its fulfilment according to that exposition, as there is on the other so to expound it as to furnish a release from it; and that an attempt to annul it by one of the parties, may present to the other, an option of acquiescing in the annulment, or of preventing it as the one or the other course may be deemed the lesser evil. This is a consideration which ought deeply to impress itself on every patriotic mind, as the strongest dissuasion from unnecessary approaches to such a crisis. What would be the condition of the States attached to the Union & its Govt. and regarding both as essential to their well-being, if a State placed in the midst of them were to renounce its Federal obligations, and erect itself into an independent and alien nation? Could the States N. & S. of Virginia, Pennsyla. or N. York, or of some other States however small, remain associated and enjoy their present happiness, if geographically, politically and practically thrown apart by such a breach in the chain which unites their interests and binds them together as neighbours & fellow citizens. It could not be. The innovation would be fatal to the Federal Governnt. fatal to the Union, and fatal to

the hopes of liberty and humanity; and presents a catastrophe at which all ought to shudder.

"Without identifying the case of the U. S. with that of individual States, there is at least an instructive analogy between them. What would be the condition of the State of N. Y. of Masss. or of Pena. for example, if portions containing their great commercial cities, invoking original rights as paramount to social & constitutional compacts, should erect themselves into distinct & absolute sovereignties? In so doing they would do no more, unless justified by an intolerable oppression, than would be done by an individual State as a portion of the Union, in separating itself, without a like cause, from the other portions. Nor would greater evils be inflicted by such a mutilation of a State of some of its parts, than might be felt by some of the States from a separation of its neighbours into absolute and alien sovereignties.

"Even in the case of a mere League between nations absolutely independent of each other, neither party has a right to dissolve it at pleasure; each having an equal right to expound its obligations, and neither, consequently a greater right to pronounce the compact void than the other has to insist on the mutual execution of it.³¹⁰ *

"Having suffered my pen to take this ramble over a subject engaging so much of your attention, I will not withhold the notes made by it from your perusal. But being aware that without more development & precision, they may in some instances be liable to misapprehension or misconstruction, I will ask the favour of you to return the letter after it has passed under your partial & confidential eye.

"I have made no secret of my surprize and sorrow at the proceedings in S. Carolina, which are understood to assert a right to annul the Acts of Congress within the State, & even to secede from the Union itself. But I am unwilling to enter the political field with the 'telum imbellis' which alone I could wield. The task of combating such unhappy aberrations belongs to other hands. A man whose years have but reached

* See in Mr. Jefferson's volumes, his letters to J. M., Mr. Monroe & Col. Carrington.

the canonical three-score-&-ten (and mine are much beyond the number) should distrust himself, whether distrusted by his friends or not, and should never forget that his arguments, whatever they may be will be answered by allusions to the date of his birth." *

"MONTPELLIER, Decr 23, 1832.

"DR. SIR I have received yours of the 19th, inclosing some of the South Carolina papers. There are in one of them some interesting views of the doctrine of secession; one that had occurred to me, and which for the first time I have seen in print; namely that if one State can at will withdraw from the others, the others can at will withdraw from her, and turn her, nolentem, volentem, out of the union.† Until of late, there is not a State that would have abhorred such a doctrine more than South Carolina, or more dreaded an application of it to herself. The same may be said of the doctrine of nullification, which she now preaches as the only faith by which the Union can be saved.

"I partake of the wonder that the men you name should view secession in the light mentioned. The essential difference between a free Government and Governments not free, is that the former is founded in compact, the parties to which are mutually and equally bound by it. Neither of them therefore can have a greater right to break off from the bargain, than the other or others have to hold them to it.‡ And certainly there is nothing in the Virginia resolutions of '98, adverse to this principle, which is that of common sense and common justice. The fallacy which draws a different conclusion from them lies in confounding a *single* party, with the *parties* to the Constitutional compact of the United States. The latter having made the compact may do what they will with it. The

* Hunt's edition of "Madison's Writings," Vol. IX, pp. 354-358.

† As put this is merely a logical, not a constitutional argument: and even considered logically it is a fallacy. The right of extrusion is not necessarily the equivalent of that of secession.

‡ Fallacy. Logic, not constitution. A State may by the nature of a constitution have the constitutional right to leave the other parties. If so they cannot have the constitutional right to prevent it: under given circumstances they might have the "natural" right to do so.

former as one only of the parties, owes fidelity to it, till released by consent, or absolved by an intolerable abuse of the power created. In the Virginia Resolutions and Report the *plural* number, *States*, is in *every* instance used where reference is made to the authority which presided over the Government. As I am now known to have drawn those documents, I may say as I do with a distinct recollection, that the distinction was intentional. It was in fact required by the course of reasoning employed on the occasion. The Kentucky resolutions being less guarded have been more easily perverted. The pretext for the liberty taken with those of Virginia is the word *respective*, prefixed to the 'rights' &c to be secured within the States. Could the abuse of the expression have been foreseen or suspected, the form of it would doubtless have been varied. But what can be more consistent with common sense, than that all having the same rights &c, should unite in contending for the security of them to each.

"It is remarkable how closely the nullifiers who make the name of Mr. Jefferson the pedestal for their colossal heresy, shut their eyes and lips, whenever his authority is ever so clearly and emphatically against them. You have noticed what he says in his letters to Monroe & Carrington Pages 43 & 203, vol. 2, with respect to the powers of the old Congress to coerce delinquent States, and his reasons for preferring for the purpose a naval to a military force; and moreover that it was not necessary to find a right to coerce in the Federal Articles, that being inherent in the nature of a compact. It is high time that the claim to secede at will should be put down by the public opinion; and I shall be glad to see the task commenced by one who understands the subject." *

"I have received the letter signed 'A Friend of Union and State Rights,' enclosing two Essays under the same signature.

"It is not usual to answer communications without the proper names to them. But the ability and the motives disclosed in the essay induce me to say, in compliance with the wish expressed, that I do not consider the proceedings of

* Madison's letter to N. P. Trist, Hunt's Edition, Vol. IX, pp. 489-491.

Virginia in '98-99 as countenancing the doctrine that a State may *at will* secede from its constitutional compact with the other states. A rightful secession requires the consent of the others, or an abuse of the compact absolving the seceding party from the obligation imposed by it.

"In order to understand the reasoning on one side of the question, it is necessary to keep in view the precise state of the question and the positions and arguments on the other side. This is particularly necessary in questions arising under our novel and compound system of government. Much error and confusion have grown out of a neglect of this precaution.

"The case of the alien and sedition acts was a question between the Government and the constituent body, Virginia making an appeal to the latter against the assumption of power by the former.

"The case of a claim in a State to secede from its union with the others is a question among the states themselves as parties to a compact.

"In the former case it was asserted against Virginia, that the states had no right to interpose legislative declarations of opinion on a constitutional point; nor a right to interpose at all against a decision of the Supreme Court of the United States, which was to be regarded as a tribunal from which there could be no appeal.

"The object of Virginia was to vindicate *legislative* declarations of opinion; to designate the several *constitutional* modes of interposition by the states against abuses of power, and to establish the ultimate authority of the states as *parties to and creatures* of the Constitution to interpose against the decisions of the judicial as well as the other branches of the Government—the authority of the judicial being in no sense *ultimate*, out of the purview and form of the Constitution.

"Much use has been made of the term 'respective' in the third resolution of Virginia, which asserts the right of the *States*, in cases of sufficient magnitude to interpose 'for maintaining within their *respective* limits the authorities, and so forth, appertaining to them;' the term 'respective' being construed to mean a constitutional right in *each* State, *separately*,

to decide on and resist by force encroachments within its limits. A foresight or apprehension of the misconstruction might easily have guarded against it. But, to say nothing of the distinction between ordinary and extreme cases, it is observable that in this, as in other instances throughout the resolution, the plural number (*States*) is used in referring to them that a concurrence and co-operation of all might well be contemplated in interpositions for effecting the objects within reach; and that the language of the closing resolution corresponds with this view of the third. The course of reasoning in the report on the resolutions requires the distinction between *a State* and *the States*.

"It surely does not follow from the fact of the states, or rather the people embodied in them, having, as parties to the constitutional compact, no tribunal above them, that, in controverted meanings of the compact, a minority of the parties can rightfully decide against the majority, still less that a single party can decide against the rest, and as little that it can at will withdraw itself altogether from its compact with the rest.

"The characteristic distinction between free Governments, and Governments not free is that the former are founded on compact, not between the Government and those for whom it acts, but among the parties creating the Government. Each of these being equal, neither can have more right to say that the compact has been violated and dissolved than every other has to deny the fact and to insist on the execution of the bargain. An inference from the doctrine that a single state has a right to secede at will from the rest is that the rest would have an equal right to secede from it; in other words, to turn it, against its will, out of its union with them. Such a doctrine would not, till of late, have been palatable anywhere, and nowhere less so than where it is now most contended for.

"A careless view of the subject might find an analogy between state secession and individual expatriation. But the distinction is obvious and essential, even in the latter case, whether regarded as a right impliedly reserved in the original social compact, or as a reasonable indulgence, it is not exempt

from certain conditions. It must be used without injustice or injury to the community from which the expatriating party separates himself. Assuredly he could not withdraw his portion of territory from the common domain. In the case of a State seceding from the union, its domain would be dismembered, and other consequences brought on not less obvious than pernicious." ^{31D} *

"MONTPEL., March 12, 1833.

"DEAR SIR I have recd. your very kind letter of the 6th, from Washington, and by the same mail a copy of your late Speech in the Senate for which I tender my thanks. I have found as I expected, that it takes a very able and enlightening view of its subject. I wish it may have the effect of reclaiming to the doctrine & language held by all from the birth of the Constitution, & till very lately by themselves, those who now Contend that the States have never parted with an Atom of their sovereignty; and consequently that the Constitutional band which holds them together, is a mere league or partnership, without any of the characteristics of sovereignty or nationality.

"It seems strange that it should be necessary to disprove this novel and nullifying doctrine; and stranger still that those who deny it should be denounced as Innovators, heretics & Apostates. Our political system is admitted to be a new Creation—a real nondescript. Its character therefore must be sought within itself; not in precedents, because there are none; not in writers whose comments are guided by precedents. Who can tell at present how Vattel and others of that class, would have qualified (in the Gallic sense of the term) a Compound & peculiar system with such an example of it as ours before them.

"What can be more preposterous than to say that the States as united, are in no respect or degree, a Nation, which implies sovereignty; altho' acknowledged to be such by all other Nations & Sovereigns, and maintaining with them, all the in

* Madison's letter to Alexander Rives, January, 1833. Hunt's Edition, Vol. IX, pp. 495-497.

ternational relations, of war & peace, treaties, commerce, &c, and, on the other hand and at the same time, to say that the States separately are compleatly nations & sovereigns; although they can separately neither speak nor harken to any other nation, nor maintain with it any of the international relations whatever and would be disowned as Nations if presenting themselves in that character.

"The nullifiers it appears, endeavor to shelter themselves under a distinction between a delegation and a surrender of powers. But if the powers be attributes of sovereignty & nationality & the grant of them be perpetual, as is necessarily implied, where not otherwise expressed, sovereignty & nationality according to the extent of the grant are effectually transferred by it, and a dispute about the name, is but a battle of words. The practical result is not indeed left to argument or inference. The words of the Constitution are explicit that the Constitution & laws of the U. S. shall be supreme over the Constitution & laws of the several States; supreme in their exposition and execution as well as in their authority. Without supremacy in those respects it would be like a scabbard in the hand of a soldier without a sword in it. The imagination itself is startled at the idea of twenty-four independent expounders of a rule that cannot exist, but in a meaning and operation, the same for all.

"The conduct of S. Carolina has called forth not only the question of nullification; but the more formidable one of secession. It is asked whether a State by resuming the sovereign form in which it entered the Union, may not of right withdraw from it at will. As this is a simple question whether a State, more than an individual, has a right to violate its engagements, it would seem that it might be safely left to answer itself. But the countenance given to the claim shows that it cannot be so lightly dismissed. The natural feelings which laudably attach the people composing a State, to its authority and importance, are at present too much excited by the unnatural feelings, with which they have been inspired agst. their brethren of other States, not to expose them, to the danger of being misled into erroneous views of the nature of

the Union and the interest they have in it. One thing at least seems to be too clear to be questioned; that whilst a State remains within the Union it cannot withdraw its citizens from the operation of the Constitution & laws of the Union. In the event of an actual secession without the Consent of the Co-States, the course to be pursued by these involves questions painful in the discussion of them. God grant that the menacing appearances, which obtruded it may not be followed by positive occurrences requiring the more painful task of deciding them!

"In explaining the proceedings of Virga. in 98-99, the state of things at that time was the more properly appealed to, as it has been too much overlooked. The doctrines combated are always a key to the arguments employed. It is but too common to read the expressions of a remote period thro' the modern meaning of them, & to omit guards agst. misconstruction not anticipated. A few words with a prophetic gift, might have prevented much error in the glosses on those proceedings. The remark is equally applicable to the Constitution itself." *

"It has hitherto been understood, that the supreme power, that is, the sovereignty of the people of the States, was in its nature divisible, and was in fact divided, according to the Constitution of the U. States, between the States in their united and the States in their individual capacities that as the States, in their highest sov. char., were competent to surrender the whole sovereignty and form themselves into a consolidated State, so they might surrender a part & retain, as they have done, the other part, forming a mixed Govt. with a division of its attributes as marked out in the Constitution.

"Of late, another doctrine has occurred, which supposes that sovereignty is in its nature indivisible; that the societies denominated States, in forming the constitutional compact of the U. States, acted as indivisible sovereignties, and consequently, that the sovereignty of each remains as absolute and entire as it was then, or could be at any time.

"This discord of opinions arises from a propensity in many

* Madison's letter to William Cabell Rives, Hunt's Edition, Vol. IX, pp. 511-514.

to prefer the use of theoretical guides and technical language to the division and depositories of pol. power, as laid down in the constl. charter, which expressly assigns certain powers of Govt. which are the attributes of sovereignty of the U. S., and even declares a practical supremacy of them over the powers reserved to the States; a supremacy essentially involving that of exposition as well as of execution; for a law could not be supreme in one depository of power if the final exposition of it belonged to another.

"In settling the question between these rival claims of power, it is proper to keep in mind that all power in just & free Govts. is derived from compact, that when the parties to the compact are competent to make it, and when the compact creates a Govt., and arms it not only with a moral power, but the physical means of executing it, it is immaterial by what name it is called. Its real character is to be decided by the compact itself; by the nature and extent of the powers it specifies, and the obligations imposed on the parties to it.

"As a ground of compromise let, then, the advocates of State rights acknowledge this rule of measuring the Federal share of sovereign power under the const. compact; and let it be conceded, on the other hand, that the States are not deprived by it of that corporate existence and political unity which wd. in the event of a dissolution, voluntary or violent, of the Constn. replace them in the condition of separate communities, that being the condition in which they entered into the compact.

"At the period of our Revoln. it was supposed by some that it dissolved the social compact within the Colonies, and produced a state of nature which required a naturalization of those who had not participated in the revoln. The question was brought before Cong. at its first session by Dr. Ramsay, who contested the election of Wm. Smith; who, though born in S. C., had been absent at the date of Independence. The decision was, that his birth in the Colony made him a member of the society in its new as well as its original state.

"To go to the bottom of the subject, let us consult the Theory which contemplates a certain number of individuals as meeting and agreeing to form one political society, in order

that the rights, the safety & the interest of each may be under the safeguard of the whole.

"The first supposition is, that each individual being previously independent of the others, the compact which is to make them one society must result from the free consent of *every* individual.

"But as the objects in view could not be attained, if every measure conducive to them required the consent of every member of the society, the theory further supposes, either that it was a part of the original compact, that the will of the majority was to be deemed the will of the whole, or that this was a law of nature, resulting from the nature of political society itself, the offspring of the natural wants of man.

"Whatever be the hypothesis of the origin of the *lex majoris partis*, it is evident that it operates as a plenary substitute of the will of the majority of the society for the will of the whole society; and that the sovereignty of the society as vested in & exercisable by the majority, may do anything that could be *rightfully* done by the unanimous concurrence of the members; the reserved rights of individuals (of conscience for example) in becoming parties to the original compact being beyond the legitimate reach of sovereignty, wherever vested or however viewed.

"The question then presents itself, how far the will of a majority of the society, by virtue of its identity with the will of the society, can divide, modify, or dispose of the sovereignty of the society; and quitting the theoretic guide, a more satisfactory one will perhaps be found—1, In what a majority of a society has done, and been universally regarded as having had a right to do; 2, What it is universally admitted that a majority by virtue of its sovereignty might do, if it chose to do.

"1. The majority has not only naturalized, admitted into social compact again, but has divided the sovereignty of the society by actually dividing the society itself into distinct societies equally sovereign. Of this operation we have before us examples in the separation of Kentucky from Virginia and of

Maine from Massachusetts; events wch. were never supposed to require a unanimous consent of the individuals concerned.

"In the case of naturalization a new member is added to the social compact, not only without a unanimous consent of the members, but by a majority of the governing body, deriving its powers from a majority of the individual parties to the social compact.

"2. As, in those cases just mentioned, one sovereignty was divided into two by dividing one State into two States; so it will not be denied that two States equally sovereign might be incorporated into one by the voluntary & joint act of majorities only in each. The Constitution of the U. S. has itself provided for such a contingency. And if two States, could thus incorporate themselves into one by a mutual surrender of the entire sovereignty of each; why might not a partial incorporation, by a partial surrender of sovereignty, be equally practicable if equally eligible. And if this could be done by two States, why not by twenty or more?

"A division of sovereignty is in fact illustrated by the exchange of sovereign rights often involved in Treaties between Independent Nations, and still more in the several confederacies which have existed, and particularly in that which preceded the present Constitution of the United States.

"Certain it is that the constitutional compact of the U. S. has allotted the supreme power of Govt. partly to the United States by special grants, partly to the individual States by general reservations; and if sovereignty be in its nature divisible, the true question to be decided is, whether the allotment has been made by the competent authority, and this question is answered by the fact that it was an act of the *majority* of the people in each State in their highest sovereign capacity, equipollent to a *unanimous* act of the people composing the State in that capacity.

"It is so difficult to argue intelligibly concerning the compound system of Govt. in the U. S. without admitting the divisibility of sovereignty, that the idea of sovereignty, as divided between the Union and the members composing the Union, forces itself into the view, and even into the language.

of those most strenuously contending for the unity & indivisibility of the *moral being* created by the social compact. 'For security agst. oppression from abroad we look to the *sovereign power* of the U. S. to be exerted according to the compact of union; for security agst. oppression from within, or domestic oppression, we look to the sovereign power of the State. Now all sovereigns are equal; the sovereignty of the State is equal to that of the Union, for the sovereignty of each is but a *moral person*. That of the State and that of the Union are each a moral person, and in that respect precisely equal.' These are the words in a speech which, more than any other, has analyzed & elaborated this particular subject, and they express the view of it finally taken by the speaker, notwithstanding the previous one in which he says, 'the States, whilst the Constitution of the U. S. was forming, were not even shorn of *any* of their sovereign power by that process.'

"That a sovereignty would be lost & converted into a vassalage, if subjected to a foreign sovereignty over which it had no controul, and in which it had no participation, is clear & certain, but far otherwise is a surrender of portions of sovereignty by compacts among sovereign communities making the surrenders equal & reciprocal & of course giving to each as much as is taken from it.

"Of all free Govts. compact is the basis & the essence, and it is fortunate that the powers of Govt. supreme as well as subordinate can be so moulded & distributed, so compounded and divided by those on whom they are to operate as will be most suitable to their conditions, will best guard their freedom, and best provide for their safety." *

"Altho' the Legislature of Virginia declared at a late session almost unanimously, that S. Carolina was not supported in her doctrine of nullification by the Resolutions of 1798, it appears that those resolutions are still appealed to as expressly or constructively favoring the doctrine.^{31DD}

"That the doctrine of nullification may be clearly understood it must be taken as laid down in the Report of a special

* Madison's MSS., "Sovereignty," 1835, Hunt's Edition, Vol. IX, pp. 568-573.

committee of the House of Representatives of S. C. in 1828. In that document it is asserted, that a single State has a constitutional right to arrest the execution of a law of the U. S. within its limits; that the arrest is to be presumed right and valid, and is to remain in force unless $\frac{3}{4}$ of the States, in a Convention, shall otherwise decide.

"The forbidding aspect of a naked creed, according to which a process instituted by a single State is to terminate in the ascendancy of a minority of 7, over a majority of 17, has led its partizans to disguise its deformity under the position that a single State may rightfully resist an unconstitutional and tyrannical law of the U. S., keeping out of view the essential distinction between a constitutional right and the natural and universal right of resisting intolerable oppression. But the true question is whether a single state has a constitutional right to annul or suspend the operation of a law of the U. S. within its limits, the State remaining a member of the Union, and admitting the Constitution to be in force.

"With a like policy, the nullifiers pass over the state of things at the date of the proceedings of Vira. and the particular doctrines and arguments to which they were opposed; without an attention to which the proceedings in this as in other cases may be insecure agst. a perverted construction.

"It must be remarked also that the champions of nullification, attach themselves exclusively to the 3. Resolution, averting their attention from the 7 Resolution which ought to be coupled with it, and from the Report also, which comments on both, & gives a full view of the object of the Legislature on the occasion.

"Recurring to the epoch of the proceedings, the facts of the case are that Congs. had passed certain acts, bearing the name of the alien and sedition laws, which Virg & some of the other States, regarded as not only dangerous in their tendency, but unconstitutional in their text; and as calling for a remedial interposition of the States. It was found also that not only was the constitutionality of the acts vindicated by a predominant party, but that the principle was asserted at the same time, that a sanction to the acts given by the supreme Judicial

authority of the U. S. was a bar to any interposition whatever on the parts of the States, even in the form of a legislative declaration that the acts in question were unconstitutional.

"Under these circumstances, the subject was taken up by Virga. in her resolutions, and pursued at the ensuing session of the Legislature in a comment explaining and justifying them; her main and immediate object, evidently being, to produce a conviction everywhere, that the Constitution had been violated by the obnoxious acts and to procure a concurrence and co-operation of the other States in effectuating a repeal of the acts. She accordingly asserted and offered her proofs at great length, that the acts were unconstitutional. She asserted moreover & offered her proofs that the States had a right in such cases, to interpose, first in their constituent character to which the govt. of the U. S. was responsible, and otherwise as specially provided by the Constitution; and further, that the States, in their capacity of parties to and creators of the Constitution, had an ulterior right to interpose, notwithstanding any decision of a constituted authority; which, however it might be the *last resort* under the forms of the Constitution in cases falling within the scope of its functions, could not preclude an interposition of the States as the parties which made the Constitution and, as such, possessed an authority paramount to it.

"In this view of the subject there is nothing which excludes a natural right in the States individually, more than in any portion of an individual State, suffering under palpable and insupportable wrongs, from seeking relief by resistance and revolution.

"But it follows, from no view of the subject, that a nullification of a law of the U. S. can as is now contended, belong rightfully to a single State, as one of the parties to the Constitution; the State not ceasing to avow its adherence to the Constitution. A plainer contradiction in terms, or a more fatal inlet to anarchy, cannot be imagined.

"And what is the text in the proceedings of Virginia which this spurious doctrine of nullification claims for its parentage?

It is found in the 3d. of the Resolutions of -98, which is in the following words.

“ ‘That in case of a deliberate, a palpable & dangerous exercise of powers not granted by the [constitutional] compact, the *States* who are parties thereto have a right and are in duty bound to interpose for arresting the progress of the evil, & for maintaining within their respective limits, the authorities rights & liberties appertaining to them.’

“Now is there anything here from which a *single* State can infer a right to arrest or annul an act of the General Govt. which it may deem unconstitutional? So far from it, that the obvious & proper inference precludes such a right on the part of a single State; *plural* number being used in every application of the term.

“In the next place, the course & scope of the reasoning requires that by the rightful authority to interpose in the cases & for the purposes referred to, was meant, not the authority of the States *singly & separately*, but their authority as the *parties* to the Constn., the authority which, in fact, made the Constitution; the authority which being paramount to the Constitution was paramount to the authorities constituted by it, to the Judiciary as well as the other authorities. The resolution derives the asserted right of interposition for arresting the progress of usurpations by the Federal Govt. from the fact, that its powers were limited to the grant made by the States; a grant certainly not made by a *single* party to the grant, but by the parties to the compact containing the grant. The mode of their interposition, in extraordinary cases, is left by the Resolution to the parties themselves; as the mode of interposition lies with the parties to other Constitutions, in the event of usurpations of power not remediable, under the forms and by the means provided by the Constitution. If it be asked why a claim by a single party to the constitutional compact, to arrest a law, deemed by it a breach of the compact, was not expressly guarded agst. the simple answer is sufficient that a pretension so novel, so anomalous & so anarchical, was not & could not be anticipated.

“In the third place, the nullifying claim for a single State

is probably irreconcilable with *the effect* contemplated by the interposition claimed by the Resolution for the parties to the Constitution namely that of 'maintaining within the respective limits of the States the authorities rights & liberties appertaining to them.' Nothing can be more clear than that these auths. &c., &c., of the States, in other words, the authority & laws of the U. S. must be the same in all; or that this cannot continue to be the case, if there be a right in each to annul or suspend within itself the operation of the laws & authority of the whole. There cannot be different laws in different states on subjects within the compact without subverting its fundamental principles, and rendering it as abortive in practice as it would be incongruous in theory. A concurrence & co-operation of the States in favor of each, would have the effect of preserving the necessary uniformity in all, which the Constitution so carefully & so specifically provided for in cases where the rule might be in most danger of being violated. Thus the citizens of every State are to enjoy reciprocally the privileges of citizens in every other State. Direct taxes are to be apportioned on all, according to a fixed rule. Indirect taxes are to be the same in all the States. The duties on imports are to be uniform: No preference is to be given to the ports of one State over those of another. Can it be believed, that with these provisions of the Constn. illustrating its vital principles fully in view of the Legislature of Virginia, that its members could in the Resolution quoted, intend to countenance a right in a single State to distinguish itself from its co-States, by avoiding the burdens, or restrictions borne by them; or indirectly giving the law to them? ^{31E}

"These startling consequences from the nullifying doctrine have driven its partizans to the extravagant presumption that no State would ever be so unreasonable, unjust & impolitic as to avail itself of its right in any case not so palpably just and fair as to ensure a concurrence of the others, or at least the requisite proportion of them.

"Omitting the obvious remark that in such a case the law would never have been passed or immediately repealed; and the surprize that such a defence of the nullifying right should

come from S. C. in the teeth & at the time of her own example, the presumption of such a forbearance in each of the States, or such a pliability in all, among 20 or 30 independent sovereignties, must be regarded as a mockery by those who reflect for a moment on the human character, or consult the lessons of experience, not the experience of other countries & times, but that among ourselves; and not only under the former defective Confederation, but since the improved system took place of it. Examples of differences, persevering differences among the States on the constitutionality of Federal acts, will readily occur to every one; and which would, e'er this, have defaced and demolished the Union, had the nullifying claim of S. Carolina been indiscriminately exercisable. In some of the States, the carriage-tax would have been collected, in others unpaid. In some the tariff on imports would be collected; in others, openly resisted. In some, lighthouses wd. be established; in others denounced. In some States there might be war with a foreign power; in others, peace and commerce. Finally, the appellate authority of the Supreme Court of the U. S. would give effect to the Federal laws in some States, whilst in others they would be rendered nullities by the State Judiciaries. In a word, the nullifying claims if reduced to practice, instead of being the conservative principle of the Constitution, would necessarily, and it may be said obviously, be a deadly poison.

"Thus, from the 3d. resolu. itself, whether regard be had to the employment of the term *States* in the plural number, the argumentative use of it, or to the object namely the 'maintaining the authority & rights of each, which must be the same in all as in each, it is manifest that the adequate interposition to which it relates, must not be a single, but a concurrent interposition.

"If we pass from the 3d. to the 7th. Resolution, which, tho' it repeats and re-enforces the 3d. and which is always skipped over by the nullifying commentators, the fallacy of their claim will at once be seen. The resolution is in the following words. ["That the good people of the commonwealth having ever felt and continuing to feel the most sincere affection to their

brethren of the other states, the truest anxiety for establishing and perpetuating the union of all, and the most scrupulous fidelity to that Constitution which is the pledge of mutual friendship and the instrument of mutual happiness, the General Assembly doth solemnly appeal to the like dispositions in the other states, in confidence that they will concur with this commonwealth in declaring, as it does hereby declare, that the acts aforesaid are unconstitutional, and that the necessary and proper measures will be taken by each for co-operating with this state in maintaining unimpaired the authorities, rights and liberties reserved in the states respectively or to the people.'] Here it distinctly appears, as in the 3d. resolu. that the course contemplated by the Legislature, 'for maintaining the authorities, rights, & liberties reserved to the States respectively,' was not a *solitary* or *separate* interposition, but a *co-operation* in the means necessary & proper for the purpose.

"If a further elucidation of the view of the Legislature could be needed, it happens to be found in its recorded proceedings. In the 7th. Resolution as originally proposed, the term '*unconstitutional*,' was followed by null void, &c. These added words being considered by some as giving pretext for some disorganizing misconstruction, were unanimously stricken out, or rather withdrawn by the mover of the Resolutions.

"An attempt has been made, by ascribing to the words stricken out, a nullifying signification, to fix on the reputed draftsman of the Resolution the character of a nullifier. Could this have been effected, it would only have vindicated the Legislature the more effectually from the imputation of favoring the doctrine of S. Carolina. The unanimous erasure of nullifying expressions was a protest by the H. of Delegates, in the most emphatic form against it.

"But let us turn to the 'Report,' which explained and vindicated the Resolutions; and observe the light in which it placed first the third and then the 7th.

"It must be recollected that this Document proceeded from Representatives chosen by the people some months after the Resolutions had been before them, with a longer period for

manifesting their sentiments before the Report was adopted; and without any evidence of disapprobation in the Constituent Body. On the contrary, it is known to have been recd. by the Republican party, a decided majority of the people, with the most entire approbation. The Report therefore must be regarded as the most authoritative evidence of the meaning attached by the State to the Resolutions. This consideration makes it the more extraordinary, and let it be added the more inexcusable, in those, who in their zeal to extract a particular meaning from a particular resolution, not only shut their eyes to another Resolution, but to an authentic exposition of both.

"And what is the comment of the Report on that particular resolution? namely, the 3d.

"In the first place, it conforms to the resolution in using the term which expresses the interposing authy. of the States, in the *plural* number *States*, not in the singular number *State*. It is indeed impossible not to perceive that the entire current & complexion of the observations explaining & vindicating the resols. imply necessarily, that by the interposition of the States for arresting the evil of usurpation, was meant a concurring authy. not that of a *single* state; whilst the collective meaning of the term, gives consistency & effect to the reasoning & the object.

"But besides this general evidence that the Report in the invariable use of the plural term *States*, withheld from a single State the right expressed in the Resoln. a still more precise and decisive inference, to the same effect, is afforded by several passages in the document.

"Thus the report observes 'The States then being the parties to the constl. compact, and in their highest sovereign capacity, it follows of necessity, that there can be no tribunal above *their* authy. to decide in the *last* resort, whether the compact made by them be violated; and consequently that as the parties to it, they must *themselves* decide in the last resort such questions as may be of sufficient magnitude to require their interposition.'

"Now apart from the palpable insufficiency of an interposition by a single State to effect the declared object of the inter-

position namely, to maintain authorities & rights which must be the same in all the States, it is not true that there would be no tribunal above the authority of a state as a single party; the aggregate authority of the parties being a tribunal above it to decide in the *last* resort.

“Again the language of the Report is, ‘If the deliberate exercise of dangerous powers palpably withheld by the Constitution could not justify the parties to it in interposing even so far as to arrest the progress of the evil, & thereby preserve the Constitun. itself, as well as to provide for the safety of the parties to it, there wd. be an end to all relief from usurped power’—Apply here the interposing power of a single State, and it would not be true that there wd. be no relief from usurped power. A sure & adequate relief would exist in the interposition of the *States*, as the *co-parties* to the Constitution, with a power paramount to the Constn. itself.

“It has been said that the right of interposition asserted for the states by the proceedings of Virginia could not be meant a right for them in their collective character of parties to and creators of the Constitution, because that was a right by none denied. But as a simple truth or truism, its assertion might not be out of place when applied as in the resolution, especially in an avowed recurrence to fundamental principles, as in duty called for by the occasion. What is a portion of the Declaration of Independence but a series of simple and undeniable truths or truisms? what but the same composed a great part of the Declarations of Rights prefixed to the state constitutions? It appears, however, from the report itself, which explains the resolutions, that the last *resort* claimed for the Supreme Court of the United States, in the case of the alien and sedition laws, was understood to require a recurrence to the ulterior resort in the authority from which that of the court was derived. ‘But (continues the Report) it is objected that the judicial authority is to be regarded as the sole expositor of the Constn. in the last resort.’

“In answering this objection the Report observes, ‘that however true it may be that the judicial Dept., in all questions submitted to it by the forms of the Constn. to decide in the last

resort, this resort must necessarily *not* be the last—in relation to the rights of the parties to the constl. compact from which the Judicial as well as the other Departments hold their *delegated trusts*. On any other hypothesis, the Delegation of judicial power wd. annul the authy. delegating it, and the concurrence of this Dept. with the others in usurped power, might subvert for ever, and beyond the possible reach of any rightful remedy, the very Constitn. which all were instituted to preserve.’ Again observes the report, ‘The truth declared in the resolution being established, the expediency of making the declaration at the present day may safely be left to the temperate consideration and candid judgment of the American public. It will be remembered that a frequent recurrence to fundamental principles is solemnly enjoined by most of the State constitutions, and particularly by our own, as a necessary safeguard against the danger of degeneracy, to which republics are liable as well as other governments, though in a less degree than others. And a fair comparison of the political doctrines, not unfrequent at the present day, with those which characterized the epoch of our revolution, and which form the basis of our republican constitutions, will best determine whether the declaratory recurrence here made to those principles ought to be viewed as unreasonable and improper, or as a vigilant discharge of an important duty. The authority of constitutions over governments, and of the sovereignty of the people over constitutions, are truths which are at all times necessary to be kept in mind; and at no time, perhaps, more necessary than at present.’ *

“Who can avoid the necessity of understanding by the ‘*parties*’ to the constl. compact, the authority, which made the compact and from which all the Depts. held their delegated trusts. These trusts were certainly not delegated by a *single* party. By regarding the term *parties* in its plural, not indi-

* Always Mr. Madison asserts that the Constitution was created, not by the people of the U. S. as one, but as several peoples. What then is the people which he here asserts has sovereignty over the Constitution framed by it? Here, as elsewhere, we come up flat against the question, “Did the Constitution intend to make a majority of one people of the U. S. sovereign or not?” But this question has, it is believed, been answered.

vidual meaning, the answer to the objection is clear and satisfactory. Take the term as meaning *a party*, and not *the parties*, and there is neither truth nor argument in the answer. But further, on the hypothesis, that the rights of the *parties* meant the rights of *a party*, it wd. not be true as affirmed by the Report, that 'the Delegation of Judl. power wd. annul the authy. delegating it, and that the concurrence of this Dept. with others in usurped power might subvert for ever, & beyond the reach of any rightful remedy, the very Constitution wch. all were instituted to preserve.' However deficient a remedial right in a *single State* might be to preserve the Constn. against usurped power an ultimate and adequate remedy wd. always exist in the rights of the *parties* to the Constn. in whose hands the Constn. is at all times but clay in the hands of the potter, and who could apply a remedy by explaing. amendg., or remakg. it, as the one or the other mode might be the most proper remedy.

"Such being the comment of the Report on the 3d. Resolution, it fully demonstrates the meaning attached to it by Virginia when passing it, and rescues it from the nullifying misconstruction into which the Resolution has been distorted.

"Let it next be seen, how far the comment of the Rept. on the 7th Resoln. above inserted accords with that on the 3d.; and that this may the more conveniently be scanned by every eye, the comment is subjoined at full length.

"['The fairness and regularity of the course of proceedings here pursued have not protected it against objections even from sources too respectable to be disregarded.

"'It has been said that it belongs to the judiciary of the United States, and not to the state legislatures, to declare the meaning of the federal Constitution.

"'But a declaration that proceedings of the federal government are not warranted by the Constitution, is a novelty neither among the citizens nor among the legislatures of the states; are not the citizens or the Legislature of Virginia singular in the example of it [*sic*].

"'Nor can the declarations of either, whether affirming or denying the constitutionality of measures of the federal gov-

ernment, or whether made before or after judicial decisions thereon, be deemed, in any point of view, an assumption of the office of the judge. The declarations in such cases are expressions of opinions, unaccompanied with any other effect than what may produce on opinion by exciting reflection. The expositions of the judiciary, on the other hand, are carried into immediate effect by force. The former may lead to a change in the legislative expressions of the general will; possibly to a change in the opinion of the judiciary; the latter enforces the general will, while that will and that opinion continue unchanged.

“‘And if there be no impropriety in declaring the unconstitutionality of proceedings in the federal government, where can be the impropriety of communicating the declaration to other states, and inviting their concurrence in a like declaration? What is allowable for one must be allowable for all; and a free communication among the states, where the Constitution imposes no restraint, is as allowable among the state governments as among other public bodies or private citizens. This consideration derives a weight that cannot be denied to it, from the relation of the state legislatures to the federal Legislature, as the immediate constituents of one of its branches.

“‘The legislatures of the states have a right also to originate amendments to the Constitution, by a concurrence of two thirds of the whole number, in applications to Congress for the purpose. When new states are to be formed by a junction of two or more states or parts of states, the legislatures of the states concerned are, as well as Congress, to concur in the measure. The states have a right also to enter into agreements or compacts, with the consent of Congress. In all such cases, a communication among them results from the object which is common to them.

“‘It is lastly to be seen whether the confidence expressed by the resolution, that the *necessary and proper measures* would be taken by the other states for co-operating with Virginia in maintaining the rights reserved to the states or to the people, be in any degree liable to the objections which have been raised against it.

“If it be liable to objection, it must be because either the object or the means are objectionable.

“The object being to maintain what the Constitution has ordered, is in itself a laudable object.

“The means are expressed in the terms “the necessary and proper measures.” A proper object was to be pursued by means both necessary and proper.

“To find an objection, then, it must be shown that some meaning was annexed to these general terms which was not proper; and, for this purpose, either that the means used by the General Assembly were an example of improper means. or that there were no proper means to which the term could refer.

“In the example given by the state, of declaring the alien and sedition acts to be unconstitutional, and of communicating the declaration to the other states, no trace of improper means has appeared. And if the other states had concurred in making a like declaration, supported, too, by the numerous applications flowing immediately from the people, it can scarcely be doubted that these simple means would have been as sufficient as they are unexceptionable.

“It is no less certain that other means might have been employed which are strictly within the limits of the Constitution. The legislatures of the states might have made a direct representation to Congress, with a view to obtain a rescinding of the two offensive acts; or they might have represented to their respective senators in Congress their wish that two thirds thereof would propose an explanatory amendment to the Constitution; or two thirds of themselves, if such had been their option, might, by an application to Congress, have obtained a convention for the same object.

“These several means, though not equally eligible in themselves, nor probably to the states, were all constitutionally open for consideration. And if the General Assembly, after declaring the two acts to be unconstitutional, the first and most obvious proceeding on the subject, did not undertake to point out to the other states a choice among the farther means that

might become necessary and proper, the reserve will not be misconstrued by liberal minds into any culpable imputation.

“ ‘These observations appear to form a satisfactory reply to every objection which is not founded on a misconception of the terms employed in the resolutions. There is one other, however, which may be of too much importance not to be added. It cannot be forgotten, that among the arguments addressed to those who apprehended danger to liberty from the establishment of the general government over so great a country, the appeal was emphatically made to the intermediate existence of the state governments between the people and that government, to the vigilance with which they would descry the first symptoms of usurpation, and to the promptitude with which they would sound the alarm to the public. This argument was probably not without its effect; and if it was a proper one then to recommend the establishment of the Constitution, it must be a proper one now to assist in its interpretation.

“ ‘The only part of the two concluding resolutions that remains to be noticed, is the repetition in the first of that warm affection to the Union and its members, and of that scrupulous fidelity to the Constitution, which have been invariably felt by the people of this state. As the proceedings were introduced with these sentiments, they could not be more properly closed than in the same manner. Should there be any so far misled as to call in question the sincerity of these professions, whatever regret may be excited by the error, the General Assembly cannot descend into a discussion of it. Those who have listened to the suggestion can only be left to their own recollection of the part which this state has borne in the establishment of our national independence, in the establishment of our national Constitution, and in maintaining under it the authority and laws of the Union, without a single exception of internal resistance or commotion. By recurring to these facts, they will be able to convince themselves that the representations of the people of Virginia must be above the necessity of opposing any other shield to attacks on their national patriotism than their own consciousness and the justice of an enlightened public, who will perceive, in the resolutions them-

selves, the strongest evidence of attachment both to the Constitution and to the Union, since it is only by maintaining the different governments and departments within their respective limits that the blessings of either can be perpetuated.']

"Here is certainly not a shadow of countenance to the doctrine of nullification. Under every aspect, it enforces the arguments and authority agst. such an apocryphal version of the text.

"From this view of the subject, those who will duly attend to the tenour of the proceedings of Virga. and to the circumstances of the period when they took place will concur in the fairness of disclaiming the inference from the undeniableness of a truth, that it could not be the truth meant to be asserted in the Resoln. The employment of the truth asserted, and the reasons for it, are too striking to be denied or misunderstood.

"More than this, the remark is obvious, that those who resolve the nullifying claim into the *natural* right to resist intolerable oppression, are precluded from inferring that to be the right meant by the Resoln., since that is as little denied, as the paramountship of the authy., creating a Constn. over an authy. derived from it.

"The true question therefore is whether there be a *constitutional* right in a single state to nullify a law of the U. S. We have seen the absurdity of such a claim in its naked and suicidal form. Let us turn to it as modified by S. C., into a right in every State to resist within itself, the execution of a Federal law deemed by it to be unconstitutional; and to demand a Convention of the States to decide the question of constitutionality, the annulment of the law to continue in the mean time, and to be permanent, unless $\frac{3}{4}$ of the states concur in over-ruling the annulment.

"Thus, during the temporary nullification of the law, the results would be the same from those proceeding from an unqualified nullification, and the result of a convention might be, that 7 out of the 24 states, might make the temporary results permanent. It follows, that any State which could obtain the concurrence of six others, might abrogate any law

of the U. S. constructively whatever, and give to the Constitution any shape they please, in opposition to the construction and will of the other seventeen, each of the 17 having an equal right & authority with each of the 7. Every feature in the Constitution, might thus be successively changed; and after a scene of unexampled confusion & distraction, what had been unanimously agreed to as a whole, would not as a whole be agreed to by a single party. The amount of this modified right of nullification is, that a single State may arrest the operation of a law of the United States, and institute a process which is to terminate in the ascendancy of a minority over a large majority, in a Republican System, the characteristic rule of which is that the major will is the ruling will. And this newfangled theory is attempted to be fathered on Mr. Jefferson the apostle of republicanism, and whose own words declare that 'acquiescence in the decision of the majority is the vital principle of it.' [See his Inaugural Address.]

"Well might Virginia declare, as her Legislature did by a resolution of 1833 'that the resolutions of 98-99, gave no support to the nullifying doctrine of South Carolina. And well may the friends of Mr. J. disclaim any sanction to it or to any *constitutional* right of nullification from his opinions. His memory is fortunately rescued from such imputations, by the very Document procured from his files and so triumphantly appealed to by the nullifying partisans of every description. In this Document, the remedial right of nullification is expressly called a *natural* right, and, consequently, not a right derived from the Constitution, but from abuses or usurpations, releasing the parties to it from their obligation.

"It is said that in several instances the authority & laws of the U. S. have been successfully nullified by the particular States. This may have occurred possibly in urgent cases, and in confidence that it would not be at variance with the construction of the Fedl. Govt. or in cases where, operating within the Nullifying State alone it might be connived at as a lesser evil than a resort to force; or in cases not falling within the Fedl. jurisdiction; or finally in cases, deemed by the States, subversive of their *essential rights*, and justified therefore, by

the *natural* right of self-preservation. Be all this as it may, examples of nullification, tho' passing off witht. any immediate disturbance of the public order, are to be deplored, as weakeng. the common Govt. and as undermining the Union. One thing seems to be certain, that the States which have exposed themselves to the charge of nullification, have, with the exception of S. C., disclaimed it as a *constitutional* right, and have moreover protested agst. it as *modified* by the process of South Carolina.

"The conduct of Pena. and the opinions of Judge McKean & Tilgman (*sic*) have been particularly dwelt on by the nullifiers. But the final acquiescence of the state in the authy. of the Fedl. Judiciary transfers their authy. to the other scale, and it is believed that the opinions of the two judges, have been superseded by those of their brethren, which have been since & at the present time are, opposed to them.

"Attempts have been made to shew that the resolutions of Virginia contemplated a forcible resistance to the alien & sedt. laws and as evidence of it, the laws relating to the armory, and a Habs. corpus for the protection of members of her Legislature, have been brought into view. It happens however, as has been ascertained by the recorded dates that the first of these laws was enacted prior to the al. & sed. laws. As to the last, it appears that it was a general law, providing for other emergencies as well as federal arrests and its applicability never tested by any occurrence under the al. & sedn. laws. The law did not necessarily preclude an acquiescence in the supervising decision of the Fedl. Judy. shd. that not sustain the Habs. corps. which it might be calculated would be sustained. And all must agree, that cases might arise, of such violations of the security & privileges of representatives of the people, as would justify the states in a resort to the *natural* law of self-preservation. The extent of the privileges of the fedl. & State representatives of the people, agst. criminal charges by the 2 authorities reciprocally, involves delicate questions which it may be better to leave for those who are to decide on them, than unnecessarily to discuss them in advance. 31# (p. 415). The moderate views of Va. on the critical

occasion of the al. & sed. laws, are illustrated by the terms of the 7th Resol. with an eye to which the 3d Resol. ought always to be expounded, by the unanimous erasure of the terms 'null void' &c., from the 7th art. as it stood; and by the condemnation & imprisonment of Callender under the law, without the slightest opposition on the part of the state. So far was the State from countenancing the nullifying doctrine, that the occasion was viewed as a proper one for exemplifying its devotion to public order, and acquiescence in laws which it deemed unconstitutional, whilst those laws were not constitutionally repealed. The language of the Govr. in a letter to a friend, will best attest the principles & feelings which dictated the course pursued on the occasion.

"It is sometimes asked in what mode the States could interpose in their collective character as parties to the Constitution agst. usurped power. It was not necessary for the object & reasoning of the resolns. & report, that the mode should be pointed out. It was sufficient to shew that the authy. to interpose existed, and was a resort beyond that of the Supreme Court of the U. S. or any authy. derived from the Constn. The authy. being plenary, the mode was of its own choice, and it is obvious, that, if employed by the States as coparties to and creators of the Constn. it might either so explain the Constn. or so amend it as to provide a more satisfactory mode within the Constn. itself for guarding it agst. constructive or other violations.

"It remains however for the nullifying expositors to specify the right & mode of interposition which the resolution meant to assign to the States *individually*. They cannot say it was a natural right to resist intolerable oppression; for that was a right not less admitted by all than the collective right of the States as parties to the Const. the nondenial of which was urged as a proof that it could not be meant by the Resoln.

"They cannot say that the right meant was a Constitl. right to resist the constitutional authy. for that is a contradiction in terms, as much as a legal right to resist a law.

"They can find no middle ground, between a natural and a constitutional right, on which a right of nullifying interposi-

tion can be placed; and it is curious to observe the awkwardness of the attempt, by the most ingenious advocates [Upshur and Berrian].

"They will not rest the claim as modified by S. C. for that has scarce an advocate out of the State, and owes the remnant of its popularity there to the disguise under which it is now kept alive; some of the leaders admitting its indefensibility, in its naked shape.

"The result is, that the nullifiers, instead of proving that the Resoln. meant nullification, would prove that it was altogether without meaning.

"It appears from this Comment, that the right asserted and exercised by the Legislature, to *declare* an act of Congs. unconstitutional had been denied by the Defenders of the alien & sedition acts as an interference with the Judicial authority; and, consequently, that the reasonings employed by the Legislature, were called for by the doctrines and inferences drawn from that authority, and were not an idle display of what no one denied.

"It appears still farther, that the efficacious interposition contemplated by the Legislature; was a concurring and co-operating interposition of the States, not that of a single State.

"It appears that the Legislature expressly disclaimed the idea that a declaration of a State, that a law of the U. S. was unconstitutional, had the effect of *annulling* the law.

"It appears that the object to be attained by the invited co-operation with Virginia was, as expressed in the 3d. & 7th. Resol. to maintain within the several States their respective auths. rights, & liberties, which could not be constitutionally different in different States, nor inconsistent with a sameness in the authy. & laws of the U. S. in all & in each.

"It appears that the means contemplated by the Legislature for attaining the object, were measures recognized & designated by the Constitution itself.

"Lastly, it may be remarked that the concurring measures of the states, without any nullifying interposition whatever did attain the contemplated object; a triumph over the obnoxious acts, and an apparent abandonment of them for ever.

"It has been said or insinuated that the proceedings of Virga. in 98-99, had not the influence ascribed to them in bringing about that result. Whether the influence was or was not such as has been claimed for them, is a question that does not affect the meaning & intention of the proceedings. But as a question of fact, the decision may be safely left to the recollection of those who were co-temporary with the crisis, and to the researches of those who were not, taking for their guides the reception given to the proceedings by the Repubn. party every where, and the pains taken by it, in multiplying republications of them in newspapers and in other forms.

"What the effect might have been if Virga. had remained patient & silent, and still more if she had sided with S. Carolina, in favoring the alien & sedition acts, can be but a matter of conjecture.

"What would have been thought of her if she had recommended the nullifying project of S. C. may be estimated by the reception given to it under all the factitious gloss, and in the midst of the peculiar excitement of which advantage has been taken by the partizans of that anomalous conceit.

"It has been sufficiently shown, from the language of the Report, as has been seen, that the right in the States to interpose declarations & protests, agst. unconstitutional acts of Congress, had been denied; and that the reasoning in the Resolutions was called for by that denial. But the triumphant tone with which it is affirmed & reiterated that the resolutions, must have been directed agst. what no one denied, unless they were meant to assert the right of a single State to arrest and annul acts of the federal Legislature, makes it proper to adduce a proof of the fact that the declaratory right was denied, which, if it does not silence the advocate of nullification, must render every candid ear indignant at the repetition of the untruth.

"The proof is found in the recorded votes of a large and respectable portion of the House of Delegates, at the time of passing the report.

"A motion [see the Journal] offered at the closing scene affirms 'that protests made by the Legislature of this or any

other State agst. particular acts of Congs. as unconstitutional accompanied with invitations to other States, to join in such protests, are improper & unauthorized assumptions of power not permitted, nor intended to be permitted to the State Legislatures. And inasmuch as *correspondent sentiments with the present*, have been expressed by those of our sister States who have acted on the Resolutions [of 1798], Resolved therefore that the present General Assembly convinced of the impropriety of the Resolutions of the last Assembly, deem it inexpedient farther to act on the said Resolutions.'

"On this Resolution, the votes, according to the yeas & nays were 57, of the former, 98 of the latter.

"Here then within the H. of Delegates itself more than $\frac{1}{3}$ of the whole number *denied* the right of the State Legislature to proceed by acts merely declaratory agst. the constitutionality of acts of Congs. and affirmed moreover that the states who had acted on the Resols. of Va. entertained the same sentiments. It is remarkable that the minority, who denied the right of the legislatures even to protest, admitted the right of the *states* in the capacity of *parties*, without claiming it for a single state.

"With this testimony under the eye it may surely be expected that it will never again be said that such a right had never been denied, nor the pretext again resorted to that without such a denial, the nullifying doctrine alone could satisfy the true meaning of the Legislature. [See the instructions to the members of Congress passed at the same session, which do not squint at the nullifying idea; see also the protest of the minority in the Virga. Legislature. and the Report of the Comee. of Congs. on the proceedings of Virginia.]

"It has been asked whether every right has not its remedy, and what other remedy exists under the Govt. of the U. S. agst. usurpations of power, but a right in the States individually to annul and resist them.

"The plain answer is, that the remedy is the same under the government of the United States as under all other Govts. established & organized on free principles. The first remedy is in the checks provided among the constituted authorities;

that failing the next is in the influence of the Ballot-boxes & Hustings; that again failing, the appeal lies to the power that made the Constitution, and can explain, amend, or remake it. Should this resort also fail, and the power usurped be sustained in its oppressive exercise on a minority by a majority, the final course to be pursued by the minority, must be a subject of calculation, in which the degree of oppression, the means of resistance, the consequences of its failure, and consequences of its success must be the elements.

“Does not this view of the case, equally belong to every one of the States, Virginia for example?

“Should the constituted authorities of the State unite in usurping oppressive powers; should the constituent Body fail to arrest the progress of the evil thro’ the elective process according to the forms of the Constitution; and should the authority which is above that of the Constitution, the majority of the people, inflexibly support the oppression inflicted on the minority, nothing would remain for the minority, but to rally to its reserved rights (for every citizen has his reserved rights, as exemplified in Declarations prefixed to most of the State constitutions), and to decide between acquiescence & resistance, according to the calculation above stated.

“Those who question the analogy in this respect between the two cases, however different they may be in some other respects, must say, as some of them, with a boldness truly astonishing do say, that the Constitution of the U. S. which as such, and under that name, was presented to & accepted by those who ratified it; which has been so deemed & so called by those living under it for nearly half a century; and, as such sworn to by every officer, state as well as federal, is yet no Constitution, but a treaty, a league, or at most a confederacy among nations, as independent and sovereign, in relation to each other, as before the charter which calls itself a Constitution was formed.

“The same zealots must say, as they do, with a like boldness & incongruity that the Govt. of the U. S. wch. has been so deemed & so called from its birth to the present time; which is organized in the regular forms of Representative Govts. and

like them operates directly on the individuals represented; and whose laws are declared to be the supreme law of the land, with a physical force in the govt. for executing them, is yet no govt. but a mere agency, a power of attorney, revocable at the will of any of the parties granting it.

“Strange as it must appear, there are some who maintain these doctrines, and hold this language: and what is stranger still, denounce those as heretics and apostates who adhere to the language & tenets of their fathers, and this is done with an exulting question whether every right has not its remedy; and what remedy can be found against federal usurpations, other than that of a right in every State to nullify & resist the federal acts at its pleasure?

“Yes, it may be safely admitted that every right has its remedy; as it must be admitted that the remedy under the Constitution lies where it has been marked out by the Constitution; and that no appeal can be consistently made from that remedy by those who were and still profess to be parties to it, but the appeal to the parties themselves having an authority above the Constitution or to the law of nature & of nature’s God.

“It is painful to notice such a sophism as that by which this inference is assailed. Because an unconstitutional law is no law, it is alleged that it may be constitutionally disobeyed by all who think it unconstitutional. The fallacy is so obvious, that it can impose on none but the most biased or heedless observers. It makes no distinction where the distinction is obvious, and *essential*, between the case of a law *confessedly* unconstitutional, and a case turning on a *doubt* & a *divided opinion* as to the meaning of the Constitution; on a question, not whether the Constitution ought or ought not to be obeyed; but on the question, what is the Constitution. And can it be seriously & deliberately maintained, that every individual or every subordinate authy. or every party to a compact, has a right to take for granted, that its construction is the infallible one, and to act upon it agst. the construction of all others, having an equal right to expound the instrument, nay against the regular exposition of the constituted authorities, with the

tacit sanction of the community. Such a doctrine must be seen at once to be subversive of all constitutions, all laws, and all compacts. The provision made by a Constn. for its own exposition, thro' its own authorities & forms, must prevail whilst the Constitution is left to itself by those who made it; or until cases arise which justify a resort to ultra-constitutional interpositions.

"The main pillar of nullification is the assumption that sovereignty is a unit, at once indivisible and unalienable; that the states therefore individually retain it entire as they originally held it, and consequently that no portion of it can belong to the U. S.

"But is not the Constn. itself necessarily the offspring of a sovn. authy.? What but the highest pol. authy. a sovereign authy., could make such a Constn.? a constn. wch. makes a Govt.; a Govt. which makes laws; laws which operate like the laws of all other govts. by a penal & physical force, on the individuals subject to the laws; and finally laws declared to be the Supreme law of the land; anything in the Constn. or laws of the individual State notwithstanding.

"And where does the sovy. which makes such a Constn. reside? It resides not in a single state but in the people of each of the several states, uniting with those of the others in the express & solemn compact which forms the Constn. To the *extent* of that compact or Constitution therefore, the people of the several States must be a sovereign as they are a united people.

"In like manner, the constns. of the States, made by the people as separated into States, were made by a sovereign authy. by a sovereignty residing in each of the States, to the extent of the objects embraced by their respective constitutions. And if the states be thus sovereign, though shorn of so many of the essential attributes of sovereignty, the U. States by virtue of the sovereign attributes with wch. they are endowed, may, to that extent, be sovereign, tho' destitute of the attributes of which the States are not shorn.

"Such is the political system of the U. S. *de jure* & *de facto*; and however it may be obscured by the ingenuity and techni-

calities of controversial commentators, its true character will be sustained by an appeal to the law and the testimony of the fundamental charter.

"The more the pol. system of the U. S. is fairly examined, the more necessary it will be found, to abandon the abstract and technical modes of expounding & designating its character; and to view it as laid down in the charter which constitutes it, as a system, hitherto without a model; as neither a simple or a consolidated Govt. nor a Govt. altogether confederate; and therefore not to be explained so as to make it either, but to be explained and designated, according to the actual division and distribution of political power on the face of the instrument.

"A just inference from a survey of this polit. system is that it is a division and distribution of pol. power, nowhere else to be found; a nondescript, to be tested and explained by itself alone; and that it happily illustrates the diversified modifications of which the representative principle of republicanism is susceptible with a view to the conditions, opinions, and habits of particular communities.

"That a sovereignty should have even been denied to the States in their united character, may well excite wonder, when it is recollected that the Constn. which now unites them, was announced by the convn. which formed it, as dividing sovereignty between the Union & the States; [see letter of the Presdt. of the Convention (W.) to the old Congs.] that it was presented under that view, by contemporary expositions recommendg. it to the ratifying authorities [see Federt and other proofs]; that it is proved to have been so understood by the language which has been applied to it constantly & notoriously; that this has been the doctrine & language, until a very late date, even by those who now take the lead in making a denial of it the basis of the novel notion of nullification. [See the Report to the Legisl. of S. Carola. in 1828.] So familiar is sovereignty in the U. S. to the thoughts, views & opinions even of its polemic adversaries, that Mr. Rowan, in his elaborate speech in support of the indivisibility of sovereignty, relapsed before the conclusion of his argument into the idea

that sovereignty was partly in the Union, partly in the States. [See his speech in the *Richmond Enquirer* of the —.] Other champions of the Rights of the States among them Mr. J—n might be appealed to, as bearing testimony to the sovereignty of the U. S. If Burr had been convicted of acts defined to be treason, wch. it is allowed can be committed only agst. a sovern. authy. who wd. then have pleaded the want of sovy. in the U. S. Quere, if there be no sovy. in the U. S. whether the crime denominated treason might not be committed, without falling within the jurisdiction of the States, and consequently, with impunity?

“What seems to be an obvious & indefeasible proof that the people of the individual States, as composing the U. States must possess a sovereignty, at least in relation to foreign sovereigns is that in that supposition only, foreign Govts. would be willing or expected to maintain international relations with the U. S. Let it be understood that the Govt. at Washington was not a national Govt. representing a sovereign authy.; and that the sovereignty resided absolutely & exclusively in the several States, as the only sovereigns & nations in our political system, and the diplomatic functionaries at the seat of the Fedl. Govt. would be obliged to close their communications with the Secy. of State, and with new commissions repair to Columbia, in S. C. and other seats of the State Govts. They could no longer, as the Repts. of a sovereign authy. hold intercourse with a functionary who was but an agent of a self-called Govt. which was itself an agent, representing no sovereign authority; not of the States as separate sovereignties, nor a sovereignty in the U. S. which had no existence. For a like reason, the Plenipotentiaries of the U. S. at foreign courts, would be obliged to return home unless commissioned by the individual States. With respect to foreign nations, the confederacy of the States was held *de facto* to be a nation, or other nations would not have held national relations with it.

“There is one view of the subject which ought to have its influence on those who espouse doctrines which strike at the authoritative origin and efficacious operation of the Govt. of

the U. States. The Govt. of the U. S. like all Govts. free in their principles, rests on compact; a compact, not between the Govt. & the parties who formed & live under it; but among the parties themselves, and the strongest of Govts. are those in which the compacts were most fairly formed and most faithfully executed.

"Now all must agree that the compact in the case of the U. S. was duly formed, and by a competent authority. It was formed, in fact by the people of the several States in their highest sovereign authority; an authority which cd. have made the compact a mere league, or a consolidation of all entirely into one community. Such was their authy. if such had been their will. It was their will to prefer to either the constitutional Govt. now existing; and this being undeniably establd. by a competent and even the highest human authy., it follows that the obligation to give it all the effect to which any Govt. could be entitled; whatever the mode of its formation, is equally undeniable. Had it been formed by the people of the U. S. as one society, the authority could not have been more competent, than that which did form it; nor wd. a consolidation of the people of the States into one people, be different in validity or operation, if made by the aggregate authy. of the people of the States, than if made by the plenary sanction given concurrently as it was in their highest sovereign capacity. The Govt. whatever it be resulting from either of these processes would rest on an authy. equally competent; and be equally obligatory & operative on those over whom it was established. Nor would it be in any respect less responsible, theoretically and practically, to the constituent body, in the one hypothesis than in the other; or less subject in extreme cases to be resisted and overthrown. The faith pledged in the compact, being the vital principle of all free Govt. that is the true test by which pol. right & wrong are to be decided, and the resort to physical force justified, whether applied to the enforcement or the subversion of political power.

"Whatever be the *mode* in which the *essential* auty. establd. the Constn., the structure of this, the power of this, the rules of exposition, the means of execution, must be the same; the

tendency to consol. or dissolution the same. The question, whether we the people means the people in their aggregate capacity, acting by a numerical majy. of the whole, or by a majy. in each of all the States, the authy. being equally valid and binding, the question is interesting, but as an historical fact of merely speculative curiosity.

"Whether the centripetal or centrifugal tendency be greatest, is a problem which experience is to decide; but it depends not on the mode of the grant, but the extent and effect of the powers granted. The only distinctive circumstance is in the effect of a dissolution of the system on the resultum of the parties, which, in the case of a system formed by the people, as that of the United States was, would replace the states in the character of separate communities, whereas a system founded by the people, as one community, would, on its dissolution, throw the people into a state of nature.

"In conclusion, those who deny the possibility of a political system, with a divided sovereignty like that of the U. S., must chuse between a government purely consolidated, & an association of Govts. purely federal. All republics of the former character, ancient or modern, have been found ineffectual for order and justice within, and for security without. They have been either a prey to internal convulsions or to foreign invasions. In like manner, all confederacies, ancient or modern, have been either dissolved by the inadequacy of their cohesion, or, as in the modern examples, continue to be monuments of the frailties of such forms. Instructed by these monitory lessons, and by the failure of an experiment of their own (an experiment wch., while it proved the frailty of mere federalism, proved also the frailties of republicanism without the control of a Federal organization),⁵ the U. S. have adopted a modification of political power, which aims at such a distribution of it as might avoid as well the evils of consolidation as the defects of federation, and obtain the advantages of both. Thus far, throughout a period of nearly half a century, the new and compound system has been successful beyond any of the forms of Govt., ancient or modern, with which it may be compared; having as yet discovered no

defects which do not admit remedies compatible with its vital principles and characteristic features. It becomes all therefore who are friends of a Govt. based on free principles to reflect, that by denying the possibility of a system partly federal and partly consolidated, and who would convert ours into one either wholly federal or wholly consolidated, in neither of which forms have individual rights, public order, and external safety, been all duly maintained, they aim a deadly blow at the last hope of true liberty on the face of the Earth. Its enlightened votaries must perceive the necessity of such a modification of power as will not only divide it between the whole & the parts, but provide for occurring questions as well between the whole & the parts as between the parts themselves. A political system which does not contain an effective provision for a peaceable decision of all controversies arising within itself, would be a Govt. in name only. Such a provision is obviously essential; and it is equally obvious that it cannot be either peaceable or effective by making every part an authoritative umpire. The final appeal in such cases must be to the authority of the whole, not to that of the parts separately and independently. This was the view taken of the subject, whilst the Constitution was under the consideration of the people. [See *Federalist*, No. 39.] It was this view of it which dictated the clause declaring that the Constitution & laws of the U. S. should be the supreme law of the Land, anything in the constn. or laws of any of the States to the contrary notwithstanding. [See Art. VI.] It was the same view which specially prohibited certain powers and acts to the States, among them any laws violating the obligation of contracts, and which dictated the appellate provision in the Judicial act passed by the first Congress under the Constitution. [See Art. I.] And it may be confidently foretold, that notwithstanding the clouds which a patriotic jealousy or other causes have at times thrown over the subject, it is the view which will be permanently taken of it, with a surprise hereafter, that any other should ever have been contended for." *

* Madison's "Notes on Nullification," 1835, Hunt's Edition, Vol. IX, pp. 573-607.

(1.) "No example of the inconsistency of party zeal can be greater than is seen in the value allowed to Mr. Jefferson's authority by the nullifying party; while they disregard his repeated assertions of the Federal authority, even under the articles of confederation, to stop the commerce of a refractory State, while they abhor his opinions & propositions on the subject of slavery & overlook his declaration, that in a republick, it is a vital principle that the minority must yield to the majority—they seize on an expression of Mr. Jefferson that nullification is the rightful remedy, as the Shibboleth of their party, & almost a sanctification of their cause. But in *addition* to their inconsistency, their zeal is guilty of the subterfuge of dropping a part of the language of Mr. Jefferson, which shews his meaning to be entirely at variance with the nullifying construction. His words in the document appealed to as the infallible test of his opinions are: [. . . "but, when powers are assumed which have not been delegated, a nullification of the act is the rightful remedy: that every state has a natural right in cases not within the compact (*casus non fæderis*,) to nullify," etc.] . . .

"Thus the right of nullification meant by Mr. Jefferson is the natural right, which all admit to be a remedy against insupportable oppression. It cannot be supposed for a moment that Mr. Jefferson would not revolt at the doctrine of South Carolina, that a single state could constitutionally resist a law of the Union while remaining within it, and that with the accession of a small minority of the others, overrule the will of a great majority of the whole, & constitutionally annul the law everywhere.

"If the right of nullification meant by him had not been thus guarded agst. a perversion of it, let him be his own interpreter in his letter to Mr. Giles in December 1826 in which he makes the rightful remedy of a state in an extreme case to be a separation from the Union, not a resistance to its authority while remaining in it. The authority of Mr. Jefferson, therefore, belongs not, but is directly opposed to, the nullifying party who have so unwarrantably availed themselves of it."—Madison's Notes. (pp. 589-590.)

(2) "Madison's note says: Extract of a letter from Monroe to Madison, dated Albemarle, May 15, 1800: 'Besides, I think there is cause to suspect the sedition law will be carried into effect in this state at the approaching federal court, and I ought to be there [Richmond] to aid in preventing trouble. A camp is formed of about 400 men at Warwick, four miles below Richmond, and no motive for it assigned except to proceed to Harper's Ferry, to sow cabbage-seed. But the gardening season is passing, and this camp remains. I think it possible an idea may be entertained of opposition, and by means whereof the fair prospect of the republican party may be overcast. But in this they are deceived, as certain characters in Richmond and some neighbouring counties are already warned of their danger, so that an attempt to excite a hotwater insurrection will fail.'

"Extract from another letter from J. Monroe to J. M., dated Richmond, June 4, 1800: 'The conduct of the people on this occasion was exemplary, and does them the highest honour. They seemed aware the crisis demanded of them a proof of their respect for law and order, and resolved to show they were equal to it. I am satisfied a different conduct was expected from them, for everything that could was done to provoke it. It only remains that this business be closed on the part of the people, as it has been so far acted; that the judge, after finishing his career, go off in peace, without experiencing the slightest insult from any one; and that this will be the case I have no doubt.' *

(3) "The following note is marked by Madison as intended to be inserted at this point. Most of it appears, however, embodied in other parts of the essay:

"The predominant feelings & views of Virginia, in her Resolutions of 98 & the comment on them in the Report of 99 may be seen in the instructions to her members in Congress passed at the same session with the Report. These instructions, instead of squinting at any such doctrine as that of nullification, are limited to efforts, on the part of the members

* Pp. 591-592

1. to procure a reduction of the army 2. to prevent or stop the premature augmentation of the navy, 3. to oppose the principle lately advanced, that the common law of England is in force under the Govt. of the U. S., excepting the particular parts &c [as excepted in the Report] 4th Repeal of the alien & sedn. acts.

“ ‘Again as a final answr to the question asked with a triumphant tone, whether the solemnity of the proceedings of Virga. on that occasion, cd. be called for or wasted, in mere declarations and protests, rights which no one desired; and whether the nullifying right alone must not therefore have been the object of them? it may be observed that sufficient answer both to the fact and the inference had been already given in the appeal to language held in the answers of the several states, denying the right of a state to protest agst. the Constitutionality of acts of Congs. and to the solemnity of the concluding paragraph of the Report renewing the protest agst. the alien & sedition acts. The fact that the right of a state Legisl. to protest, was positively denied is authenticated by a large and respectable portion of the House of Delegates in their votes as recorded in the Journal of the House.

“ ‘A motion offered at the date of the Report affirms “that protests, made by the Legislature of this or of any other State, agst. particular acts of Congs. as unconstitutional, accompanied with invitations to other States to join in such protests are improper & unauthorized assumptions of power, not permitted or intended to be permitted to the State Legislatures. And inasmuch as *correspondent sentiments with the present have been expressed by those of our Sister States who have acted on the Resolutions aforesaid* [of 1798] Resolved therefore that the present Genl. Assembly convinced of the impropriety of the Resolutions of the last assembly, deem it inexpedient farther to act on the said Resolutions.”

“ ‘On this Resolution, the votes according to the yeas & nays were 57 of the former and 98 of the latter.

“ ‘Here then within the House of Delegates itself, more than—of the whole number denied & protested agst. the right

of protest, which the nullifying critics have alleged was denied by nobody.'"—Madison MSS.*

(4) "See letter of J. M. to D[aniel] W[ebster] on file [March 15, 1833].—Madison's Note.

"The letter is as follows:

"DEAR SIR—I return my thanks for the copy of your late very powerful Speech in the Senate of the United S. It crushes "nullification" and must hasten the abandonment of "Secession." But *this* dodges the blow by confounding the claim to secede at will, with the right of seceding from intolerable oppression. The former answers itself, being a violation, without cause, of a faith solemnly pledged. The latter is another name only for revolution, about which there is no theoretic controversy. Its double aspect, nevertheless, with the countenance recd. from certain quarters, is giving it a popular currency here which may influence the approaching elections both for Congress & for the State Legislature. It has gained some advantage also, by mixing itself with the question whether the Constitution of the U. S. was formed by the people or by the States, now under a theoretic discussion by animated partizans.

"It is fortunate when disputed theories, can be decided by undisputed facts. And here the undisputed fact is, that the Constitution was made by the people, but as imbodyed into the several States, who were parties to it and therefore made by the States in their highest authoritative capacity. They might, by the same authority & by the same process have converted the Confederacy into a mere league or treaty; or continued it with enlarged or abridged powers; or have imbodyed the people of their respective States into one people, nation or sovereignty; or as they did by a mixed form make them one people, nation, or sovereignty, for certain purposes, and not so for others.

"The Constitution of the U. S. being established by a Competent authority, by that of the sovereign people of the several States who were the parties to it, it remains only to inquire

* Pp. 594-595.

what the Constitution is; and here it speaks for itself. It organizes a Government into the usual Legislative Executive & Judiciary Departments; invests it with specified powers, leaving others to the parties to the Constitution; it makes the Government like other Governments to operate directly on the people; places at its Command the needful Physical means of executing its powers; and finally proclaims its supremacy, and that of the laws made in pursuance of it, over the Constitutions & laws of the States; the powers of the Government being exercised, as in other elective & responsible Governments, under the controul of its Constituents, the people & legislatures of the States, and subject to the Revolutionary *Rights* of the people in extreme cases.

“It might have been added, that whilst the Constitution, therefore, is admitted to be in force, its *operation*, in *every respect* must be precisely the *same*, whether its authority be derived from that of the *people*, in the one or the other of the modes, in question; the authority being equally Competent in both; and that, without an annulment of the Constitution itself its supremacy must be submitted to.

“The only distinctive effect, between the two modes of forming a Constitution by the authority of the people, is that if formed by them as imbodyed into separate communities, as in the case of the Constitution of the U. S. a dissolution of the Constitutional Compact would replace them in the condition of separate communities, that being the Condition in which they entered into the compact; whereas if formed by the people as one community, acting as such by a numerical majority, a dissolution of the compact would reduce them to a state of nature, as so many individual persons. But whilst the Constitutional compact remains undissolved, it must be executed according to the forms and provisions specified in the compact. It must not be forgotten, that compact, express or implied is the vital principle of free Governments as contradistinguished from Governments not free; and that a revolt against this principle leaves no choice but between anarchy and despotism.’—Mad. MSS.*

* Pp. 604-605.

(5) "The known existence of this controul has a silent influence, which is not sufficiently adverted to in our political discussions, and which has doubtless prevented collisions, in cases which might otherwise have threatened the fabric of the Union. Another preventive resource is in the fact noted by Montesquieu, that if one member of a union becomes diseased, it is cured by the examples and the frowns of the others, before the contagion can spread."—Madison's Notes.*

The grasp of memory and logical force exerted in covering the points involved in the foregoing papers show little need for Mr. Madison's modest allusion to a "*telum imbelles*." And it is as little desired to hint at any failure of his mental powers as at intentional misstatement. Yet, in view of certain of his arguments, it is but just to Mr. Madison to recall the long interval between the things discussed and the discussion. And the tendency of time to read into his recollections, as accomplished, that which he had so earnestly striven for: to make him perceive in the Constitution the provisions he had deemed so vital to its success, yet which his advocacy had not succeeded in incorporating therein, may be readily understood.

Elaborate as are Mr. Madison's reasons, it is believed that a clue through the labyrinth is to be found in his reply to Mr. Patterson, in the Convention, *ante*; unless the reasoning of that reply is shown to be unsound, it disproves these later arguments, plausible as they are, *with one exception, viz.*: if Mr. Madison's claim that the Supreme Court was made the arbiter of the Constitutional rights of the States is well founded, then, that Constitution assumes the form stated by him in his reply to Mr. Patterson: namely that of a treaty in which "it is expressly stipulated, that a violation of particular articles shall not have" the consequence "that a breach of any one article, by any one party, leaves all the other parties at liberty to consider the whole convention as dissolved."^{31F} Accordingly this must be considered at length.^{31G}

His statement as to the meaning of the Kentucky and Virginia Resolutions is also to be considered; since, although

* P. 606.

those Resolutions, if taken according to his explanation, add nothing to his argument; they absolutely destroy it if incompatible therewith. In that case, they prove Mr. Madison's contemporary opinion of the right of nullification or secession to be diametrically opposed to that later sustained by him.^{81H}

It is unnecessary for a layman to venture an opinion on the judicial system instituted by the Constitution; as to the functions of which the gentleman who gave the final style to that instrument acknowledged uncertainly * and which has always been a subject on which high legal authorities have entertained the most opposite opinions. The fact that they have been able to do so militates against Mr. Madison's doctrine. Certainly no such power is explicitly granted by the Constitution, and if, in addition to this, the consistent refusal of the States in Convention to grant in any form a supervision by the Federal Government of State laws is remembered, it is with difficulty that it can be supposed that they intended to grant to a single department of that Government powers practically amounting to the same result. A proposition was indeed moved and referred to a committee, to provide that "the jurisdiction of the Supreme Court shall extend to all controversies between the United States and any individual State."

Various other, but minor, points of seeming inconsistency might be noted in Mr. Madison's reasoning; but space forbids going into these at the necessary length. A few susceptible of brief treatment are appended.

APPENDIX 31A

(II Page 9)

BUT having laid down this principle how does Mr. Madison apply it? He had already said:

"But it was not sufficient, say the adversaries of the proposed constitution, for the convention to adhere to the re-

* *Vide* Appendix 22A.

publican form. They ought with equal care, to have preserved the *federal* form, which regards the union as a *confederacy* of sovereign states; instead of which, they have framed a national government, which regards the union as a *consolidation* of the states. And it is asked by what authority this bold and radical innovation was undertaken. The handle which has been made of this objection requires, that it should be examined with some precision.

"Without enquiring into the accuracy of the distinction on which the objection is founded, it will be necessary to a just estimate of its force, first to ascertain the real character of the government in question; secondly, to enquire how far the convention were authorized to propose such a government; and thirdly, how far the duty they owed to their country, could supply any defect of regular authority.

"First. In order to ascertain the real character of the government it may be considered in relation to the foundation on which it is to be established; to the sources from which its ordinary powers are to be drawn to the operation of those powers; to the extent of them; and to the authority by which future changes in the government are to be introduced.

"On examining the first relation, it appears on one hand that the constitution is to be founded on the assent and ratification of the people of America, given by deputies elected for the special purpose; but on the other that this assent and ratification is to be given by the people, not as individuals composing one entire nation; but as composing the distinct and independent states to which they respectively belong. It is to be the assent and ratification of the several states derived from the supreme authority in each state, the authority of the people themselves. The act therefore establishing the constitution, will not be a *national* but a *federal* act.

"That it will be a federal and not a national act, as these terms are understood by the objectors, the act of the people as forming so many independent states, not as forming one aggregate nation is obvious from this single consideration, that it is to result neither from the decision of a *majority* of the people of the union, nor from that of a *majority* of the

states. It must result from the *unanimous* assent of the several states that are parties to it, differing no other wise from their ordinary assent than in its being expressed, not by the legislative authority, but by that of the people themselves. Were the people regarded in this transaction as forming one nation, the will of the majority of the whole people of the United States, would bind the minority; in the same manner as the majority in each state must bind the minority; and the will of the majority must be determined either by a comparison of the individual votes; or by considering the will of the majority of the states, as evidence of the will of a majority of the people of the United States. Neither of these rules has been adopted. Each state in ratifying the constitution, is considered as a sovereign body independent of all others, and only to be bound by its own voluntary act. In this relation then the new constitution will, if established, be a *federal* and not a *national* constitution." *

In the same way, in the Ratifying Convention of Virginia, Mr. Madison, replying to Mr. Henry, confuted the latter's statement that a consolidated government was formed by a Constitution, by the fact that it was entered into by the several action of the States. In that same Convention also, he said:

"Can we believe that a government of a federal nature, consisting of many coequal sovereignties." †

According, then, to Mr. Madison's repeated statements, both in Convention and in the Ratifying Convention (whose proceedings he considered as affording the clearest light on the nature of the instrument), the Constitution was, in its origin at least, altogether Federal.

Yet, having thus repeatedly stated "that the characteristic peculiarities of the Constitution," by which it is to be interpreted, are: "The mode of its formation," etc., Mr. Madison

* "The Federalist," No. 39 (by Madison).

† Elliot's "Debates," Vol. III, p. 381.

can then say that this federative mode of its formation is of no weight whatever, but,

"Whatever be the *mode* in which the essential auty. estabd. the Constn., the structure of this, the power of this, the rules of exposition, the means of execution, must be the same. The question whether 'we the people' means the people in their aggregate capacity, acting by a numerical majy. of the whole, or by a majy. in each of all the States, the authy. being equally valid and binding, the question is interesting, but as an historical fact of merely speculative curiosity." *

Again he gives it an effect only consequent on the dissolution of the Union.

"The only distinctive effect, between the two modes of forming a Constitution by the authority of the people, is that if formed by them as imbodyed into separate communities, as in the case of the Constitution of the United States a dissolution of the Constitutional Compact would replace them in the condition of separate communities, that being the Condition in which they entered into the compact; whereas if formed by the people as one Community, acting as such by a numerical majority, a dissolution of the compact would reduce them to a state of nature, as so many individual persons."

Why should this be so? *If* the Constitution dissolved the States and reconstructed them into a nation; how should its dissolution replace them as several States? In truth, a "partly consolidated" government is as hard to realize as a person partly teetotal; the term does not admit qualification.

If a government is Federal in its origin, it remains subject to the law of that origin, unless something in the nature or provisions of the compact destroys this primary characteristic of a confederacy.

"D'ailleurs, un gouvernement fut-il fort, ne saurait échapper qu'avec peine aux conséquences d'un principe, quand une fois

* Notes on Nullification, Hunt's Edition of "Madison's Writings," Vol. IX, p. 603.

il a admis ce principe lui-même comme fondement du droit principe publique qui doit le régir. La confédération a été formée par la libre volonté des Etats; ceux-ci en s'unissant, n'ont point perdu leur nationalité, et ne se sont point fondus dans un seul et même peuple. Si aujourd'hui un de ces mêmes Etats voulait retirer son nom du contrat, il serait difficile de lui prouver qu'il ne peut le faire. Le gouvernement fédéral, pour le combattre, ne s'appuierait d'une manière évidente ni sur la force, ni sur le droit . . . Je suppose que, parmi les Etats que le lien fédéral rassemble, il en soit quelques-uns qui jouissent à eux seuls des principaux avantages de l'union, ou dont la prospérité dépende entièrement du fait de l'union; il est clair que le pouvoir central trouvera dans ceux-la un très-grand appui pour maintenir les autres dans l'obéissance *mais alors il ne tirera plus sa force de lui-même, il la puisera dans un principe qui est contraire à sa nature.** Les peuples ne se confédèrent que pour retirer des avantages égaux de l'union, et, dans le cas cité plus haut, c'est parce que l'inégalité règne entre les nations unies que le gouvernement fédéral est puissant.

"Je suppose encore que l'un des Etats confédérés ait acquis une assez grande prépondérance pour s'emparer à lui seul du pouvoir central; il considérera les autres Etats comme ses sujets, et fera respecter, dans la prétendue souveraineté de l'Union, sa propre souveraineté. On fera alors de grandes choses au nom du gouvernement fédéral, mais à vrai dire, ce gouvernement n'existera plus." ^{31A1} †

"What makes any Government Federal, but the fact that it springs, with all its powers and functions, of whatever character, from covenants and agreements between the sovereign contracting parties creating it? And is it not as competent for a sovereign State to agree, that the Federal agent or Government shall act upon her citizens, in specified cases, as it is for her to agree, that the same agent, or Government may act upon herself? . . . What makes the Union between any States

* Italics by B. S.

† A. de Tocqueville, "De la Démocratie en Amérique," Vol. II, pp. 353-354; sixième éd., P., 1874.

Federal is not the manner of its action, but the *Fædus*, the Covenant, the Convention, the Compact upon which it is founded." *

"The institution of the federal government is decisive of the question, it shows the creature and the creator; the power which has made and can unmake the machine it has set in motion, as the work of its own hands, moving within defined limits, operating only on specified subjects, by delegated authority, revocable at will.

"The act of delegation is the exercise of sovereignty, and acting under it is a recognition of its supremacy: it may be without limitation in some cases, and until revoked it may be supreme; but it is so only as a delegated authority or agency,—the right to revoke, and render its exercise a nullity, is the test by which to ascertain in whom it is vested by original inherent right.

"Men are not less free when they unite and form society out of its original elements, into a body politic for the mutual safety and happiness of the parts, by a government instituted for all.

"Less or more bodies politic, may unite in their separate character for the same purpose; and agree that the power of each shall be administered by one or more bodies, whom they shall separately authorize to act in their name, and for their benefit, without a surrender or extinguishment of their sovereign character or attributes. When it is adopted voluntarily by each as a unit; the only effect is to create and erect a new body politic or corporation, by a charter or grant by the sovereign power of each. It may be declared revocable by each, by three-fourths, or require the assent of all, as by the confederation; yet as this is a matter of compact, it does not affect the nature of the ultimate sovereign power, which they separately reserve.

"Thus, the constitution itself, gives an indelible stamp of character to the government it created. It is what all confederated or federal governments are, and from their nature must be; formed by the union of two or more states or na-

* Alexander H. Stephens, "War Between the States," Vol. I, p. 487.

tions, on an equal footing, by the act of federation; a league, alliance, or constitution, is the act of each constituent part; acting in the plenitude of its own separate sovereignty, it executes the act, which delegates to a body in which each is separately represented, such powers, as they thus agree, are necessary for their federative purposes; with such restraints on their several powers, as will prevent the objects of the federation from being defeated." *

For other matter establishing the federative nature of the compact, and the political result therefrom *vide* Appendix 19.

"Whether the Constitution be a compact between the people of the several States, forming separate and distinct political communities, or an act of the American people, forming one aggregate community, derives its importance wholly from the bearing which it has on the question of the right of a State to interpose. Without such bearing,—however curious the question might be, as involving a mere historical fact, it would have very little more interest than any other connected with our constitutional history,—being destitute of all practical consequence, and having no greater power to agitate the feelings and passions of the community. It is only when viewed in connection with the question of interposition that it swells into importance;—an importance which must continue to increase just in proportion as the intimate relation between the two is perceived and appreciated. That the relation between them is, in fact, of the most intimate character,—so intimate that, if it be conceded, that the Constitution is a compact between the States in the manner stated, it follows as a necessary consequence, that the States have the right to interpose,—your committee deem susceptible of the most demonstrative proofs; and that, consequently, the only issue is, in reality, between those who maintain the doctrine above stated, and those who contend that the Constitution is the act of the American people, taken collectively. . . .

"Were it possible to establish the fact, that the Constitu-

* Opinion in *Briscoe & Others vs. Bank of Kentucky*. Henry Baldwin, "View of the Constitution," Phila., 1837.

tion was the act of the American people, considered in the aggregate, consequences would inevitably follow which would radically affect the entire character of the Government;—and which could not fail to lead to the most disastrous results. Admit its truth, and the States at once sink into mere geographical divisions—bearing the same relation to the whole, as counties do to the States,—possessed of no right, and exercising no power, but such as may be derived from the concession of the majority of the people of the whole Union,—from whom all power would be derived, and to whom, only, allegiance would be due. Viewed in this light, it would be a mere concession from the majority, that the assent of the States was necessary to give validity to the Constitution;—that three fourths of them are necessary to alter or amend the instrument;—that they have an equal representation in the Senate;—or that they possess reserved rights at all;—concessions, which could, at any time, be resumed, whenever the majority should deem fit, by a call of a Convention of the whole,—which, according to the theory in question, would have the right to strip the States of all their powers,—and even to substitute another Constitution in the place of the present,—moulded as the majority might think proper. But the exercise of this high power on the part of the majority, would be, under this view of the subject, an act of supererogation. Let it be conceded that the States, as separate and distinct communities, had no agency in the formation of the Constitution,—that the instrument, instead of being a compact between *them*, is the act of *the American people in the aggregate*,—and that the States have no right to interpose, in order to resist encroachments on their reserved powers, and the unlimited and unquestioned right of the majority to construe it at its will,—which would be a necessary consequence;—and it would inevitably, in time, mould the Constitution to its pleasure, without the trouble or hazard of substituting, formally, a new one in place of the old. When we look at the progress which this system of construction has already made in substituting the old, and rearing a new edifice in its place, contested as the right has been,—it is manifest, that, it would

be impossible to assign any limits to its power, if it be once conceded that the majority have the right of placing what construction they please on the Constitution;—or, what is the same thing, that there is no right on the part of the States to resist their construction.” *

APPENDIX 31A¹*(II Page 86)*

THIS statement is in all its parts noteworthy as a philosophical prediction, deduced from the recognized principle of confederation, of what afterwards took place. So to Mr. Grayson, in the Ratifying Convention of Virginia, was given a like prophetic vision:

“Will this Constitution remedy the fatal inconveniences of the clashing state interests? Will not every member that goes from Virginia be actuated by state influence? So they will also from every other state. Will the liberty and property of this country be secure under such a government. . . . My greatest objection is, that it will, in its operation, be found unequal, grievous, and oppressive. If it have any efficacy at all, it must be by a faction—a faction of one part of the Union against the other. I think that it has a great natural imbecility within itself, too weak for a consolidated and too strong for a confederate government. But if it be called into action by a combination of seven states, it will be terrible indeed. We need be at no loss to determine how this combination will be formed. There is a great difference of circumstances between the states. The interest of the carrying states is strikingly different from that of the productive states. I mean not to give offence to any part of America, but mankind are governed by interest. The carrying states will assuredly unite, and our situation will be then wretched indeed.”

* Calhoun, “Report for the Committee on Federal Relations of S. C., Nov., 1831,” “Works,” Vol. VII, pp. 94, 106.

Viewed from the anti-secession standpoint, the Constitution is little else than the girdle in which were bound together the combatants in the old Scandinavian knife fights, to make them more deadly. Indeed, "Punch" aptly represented the North and South, in a contemporary cartoon, by a parody upon Thorwaldsen's sculpture of that ancient amusement.

APPENDIX 31B

(II Page 10)

IN regard to this reasoning, it is a theoretic description of the ills which would ensue on the doctrine of South Carolina. In regard to these, it need only be said that quite as strong a picture of the ills of the reverse construction may be drawn by drawing Mr. Madison's contentions to their logical conclusion (and is, indeed, to all appearances, being now gradually drawn by the iron stylus of fact). It may perhaps, be questioned if the principles of any system of government so developed to their logical consequences by a clever opponent would not appear intolerable. It is, however, sufficient to say that Mr. Madison's argument upon this head has nothing to do with the question, which is solely as to what was the compact, not as to what might be its foreseen effects, however bad the principles he denounced. It was properly concerned not with the results of what might be the result of the Constitutional Compact but with what had been that Compact. The men who ratified that Compact had heard over and over again a description of the picture,—on the one side, of the effects of too little, on the other of too much, power in the Central government,—and had been more afraid of what they considered the latter danger than of the former, as evidenced by the failure of clauses repeatedly advocated by Mr. Madison, *e. g.*, the failure of "the Virginia plan" of a coercive power therein (certainly at first favoured, if not personally inspired, by Mr. Madison), the failure of Mr. Madison's plan

to give the Federal a negative on the laws of the State governments, etc., etc.

Their views, as evidenced by Constitutional provisions, are shown in the following extracts from the works of a man who, originally a political ally of Mr. Madison, separated from him as his Constitutional construction developed.

“Suppose a state legislature should pass a law, forbidding the execution of a constitutional law of Congress. In all governments there should be a supreme power.’ Suppositions, like syllogisms, may prove nothing, when they may be reversed with as much force as they are urged. Suppose Congress should pass a law prohibiting the execution of a constitutional state law, or forbidding the execution of a constitutional judgment, state or federal. Or, suppose the federal court should forbid the execution of a constitutional law passed by Congress. All these suppositions only prove, that every division and balance of power must be subject to collisions, and this is no reason why they should be destroyed, or that they are unnecessary for sustaining a free form of government. If such collisions are good reasons for justifying a concentrated power, then the principle which asserts that its division alone can preserve civil liberty, is false. This supposition places the question on its true ground, namely, which is the best principle for the preservation of the rights of the people; the concentration of power in the federal department, or its division between the federal and state departments?” *

“It is repeatedly urged, that the division of powers between the federal and state governments, will neither secure a mutual spirit of moderation, nor control the ambition of either department. If not, what will? The objection only propounds the question of preference between a federal and a national government, or between divided and concentrated power, in a new form, and endeavours to defeat the best political principle; by charging it with imperfection.” †

“The objection, that the state governments may obstruct

* John Taylor, of Caroline, “New Views on the Constitution,” pp. 218-219; 1823.

† *Ibid.*, p. 250.

federal measures, unless they are subordinate to some federal supremacy, is only equivalent to the objection, that the federal government may obstruct state measures, unless it is subordinate to a state supremacy. Neither objection affects the argument, if the constitution intended to confide both state and federal measures to a representation of a mutual and common interest in each separate case. Such objections are urged against all divisions of power. Limited kings complain that their measures are obstructed by the departments created to obstruct them. Reason, compact, and a common interest, and not a supreme power, are the only resources for settling such collisions, compatible with a division of power. These umpires have inspired the king, lords, and commons, of Britain, with a mutual moderation towards each other. If the preservation of the rights of free states and free men, cannot inspire the state and federal governments with mutual moderation, it will unfortunately prove that the children of mammon are wiser than the children of liberty. If the common interest of the states to preserve the federal government, will not be regarded, a government by force must succeed, and all our social improvements founded upon a common interest, will be lost. But have not the states as strong and better motives for nourishing their federal, as well as local prosperity, than the king, lords, and commons of England have for nourishing their concentrated supremacy? What checks against tyranny can be devised, if those founded in a common interest are unsuccessful? and can they be unsuccessful, except by exchanging them for a concentrated supremacy?" *

"In establishing the division of powers between the federal and state governments, another principle as important, and not less true than that of uniting sympathy with power, was kept in view by the convention, namely, that great power is a great temptation to do wrong. The able expositors of the constitution having in the *Federalist* adverted to this axiom, united in an opinion, that a greater share of power was reserved to the states, than was delegated to the federal government; and therefore concluded that the danger of usur-

* *Ibid.*, "New Views on the Constitution," pp. 244-245; 1823.

pation rested in that department. As neither their opinion nor inference could have any foundation, if the powers reserved to the states were controllable by the federal government, they must have believed, as they said, that each department was independent of the other within its own sphere; because, had the constitution invested the federal, with a supremacy over the state governments, the greatest share of power could not have been assigned to the latter. The anticipation of the comparative magnitude of the two primary divisions of power, to ascertain which would be most sorely afflicted with the malady of usurpation, was then chiefly conjectural; and the egregious mistake of these commentators, is both a proof that their constructions are not infallible, and also an admonition against destroying the mutual check which they commended. If experience has ascertained that the superiority of power is in the federal government, they have proved that the disposition to encroach must go with it. The axiom, that the least moderation is to be expected from the most power, decides the comparative magnitude of these primary dividends, since there is as much difficulty in discovering an instance of the usurpation of a power delegated to the federal government, by a state, as in discovering a state reserved power, not usurped or threatened by federal precedents. The whole mass of state powers are attempted to be drawn within the federal sphere, by a supremacy claiming a right to remove obstructions to its dominion; converting them, whatever may have been their constitutional magnitude, into cyphers, useful only to endow the federal sphere with an unlimited decimal increase of power. To transfer our jealousy from the encroaching sphere to that, experimentally weak, unassuming, and too submissive, would seem to violate common sense, and would certainly defeat the mutual control, eulogised by the *Federalist*, and established by the constitution, to ensure the moderation of power, upon which it is agreed that all the benefits of civil liberty depend." *

"If the constitution had intended to impose upon the state

* John Taylor, of Caroline, "New Views on the Constitution," pp. 292-293; 1823.

governments in the exercise of their powers, the duty of obeying the federal government, it would have contained provisions for extorting that duty. The subordinate agents of a concentrated power, are removable, because supremacy and subordination could not otherwise exist. The state governments are not removable, because they are not subordinate, nor the federal government supreme.

"The difference between a federal and a supreme government, was quite visible to the convention; and in considering the attributes of each, it saw that a power of appointing state governors, of revoking state laws, and of reversing state judgments, was necessary to establish one form; and that a reservation of undelegated state powers, undestroyed by subordination, was necessary to establish the other. By rejecting the consolidating attributes, it never intended to invest construction with a power of substantially reviving them, by conferring on the federal government, or either of its departments, a power of removing, revoking, and reversing, the acts of the reservation. The difficulty of banishing, hanging, or shooting, state governments, for violating the constitution, suggested the preferable provision for altering it, combined with its division of powers. Thus two absurdities were avoided; that of a supreme government, shackled with deputies whom it could neither punish nor remove; and that of a confederation of states, comprising an abolition of their rights. Consistency required a supremacy in the national government proposed, and its exclusion from the federal government adopted. As subordinate authorities, the states must have been subjected to the coercion of a supreme national government; with their reservation of independent local powers, this coercion was incongruous. A national form of government, not invested with a power to compel obedience, or local state powers, subjected to a limited federal government, would both be political absurdities, and therefore the former was not proposed, nor the latter established. The rejection of all the modes proposed for coercing the state governments, whilst a national government was in contemplation, proves that the constitution preferred the mutual check, to a concentrated

supremacy. But the federal government may coerce a disobedient state by an army, just as one of the English balancing or collateral departments, has often endeavoured to enslave the others. This mode of compelling the obedience of state governments, being infinitely more inconvenient and dangerous, could not have been contemplated by the rejection of the modes proposed, as it would destroy the mutual check allowed by the Federalist to be intended, as a conquering general might persuade or terrify the people into an opinion, that one despot was as good as an hundred, and as the submission of conquest could not have been sought for by the rejection of the milder means of obtaining obedience, by appointing governors, revoking state laws, and reversing state judgments.

"As local authorities were indispensable, the question was, which ought to be preferred; such as were responsible to the people interested to preserve local justice, and best informed as to which might advance their happiness; or such as would be subjected to the control of a national government? The former corresponded with the right of self-government; the latter with despotick principles, because it would leave to the people of each state no substantial power to provide for their own happiness. They could not be subjected to a supremacy in the federal government, and also retain their local state right of self-government. The contrariety between the two modes of constituting local authorities, was thoroughly considered in the convention, and a preference became unavoidable, because they were incapable of reconciliation. One sustained intirely the principle of self-government; the other deprived the people of every state of so much of that principle, as was applicable to their local affairs; and it was determined that the intire, was more likely to constitute a good government and preserve the liberty of the people, than the mutilated principle." *

"The incapacity of one mind for securing the liberty and happiness of an extensive country, dictates the wisdom of dividing power; and the same natural incapacity in the represen-

* John Taylor, of Caroline, "New Views on the Constitution," pp. 290-292; 1823.

tatives of one state to provide for the local good government of another, more forcibly dictated the internal independency of each. A division of mechanical labour is so highly valuable, that even a pin can be better made by many workmen than by one. In like manner it is at length happily discovered, that a division of intellectual labours is equally necessary for the construction of the most perfect form of government. It would have been more preposterous to expect that the representatives of Massachusetts could provide for the prosperity of Louisiana, than that we might get to the moon in a balloon. The human mind can only act judiciously within the scope of its intelligence. Accordingly, those powers only are intrusted to the federal government, as to which the intelligence and interest of the states are the same; and those are withheld, as to which the similarity between the intelligence and interest of the states fail. A uniformity in the operation of federal laws throughout the states, is required to prevent these wise precautions from being defeated. This uniformity illustrates the independency of local rights, because if these were liable to be regulated by federal laws, great inequalities would have ensued. The interest of one state is embraced by the intellectual powers of representatives chosen by counties, because the counties have a common interest, just as the intellectual powers of members of Congress will reach the common interests of the United States; but there would be no difference between requiring the county representatives of Virginia to regulate the local affairs of Massachusetts, and requiring the representatives from Virginia in Congress, to do the same thing. Why would the first mode of governing Massachusetts be tyrannical and absurd? Because neither the sympathies nor intellectual powers of a resident in Virginia, are adequate to the local government of Massachusetts. Are they rendered more adequate if he is chosen by the whole state, or by a district of it, instead of being chosen by a county? Will the mode of appointment revoke the laws of nature? A conviction that this could not happen, suggested the division of powers between the state and federal governments, as being a preference of knowledge

to ignorance. To expect from ignorance or an adverse interest, the fruits of knowledge and a common interest, would have been unnatural. Calamities or blessings are their respective consequences. Our system, therefore, draws upon federal knowledge and sympathy for federal prosperity, and upon state knowledge and sympathy for local prosperity. By reversing its draughts in either case, they would either be protested, or paid in very bad paper. . . . Representation was the first attempt to get rid of this alternative; but it has been rendered an incomplete remedy, by coupling it with a supreme concentrated power. The United States dissolved this infectious association, by uniting a division of state and federal powers with representation, as a mode of enforcing upon governors the admirable discovery of constitutional laws. These, intrusted to a concentrated power, have uniformly become a dead letter; but a reasonable hope was inspired that they might experience a better fate, under the mutual control against their violation, deposited in the state and federal governments, so confidently relied upon by the Federalist." *

"This reasoning establishes an essential conclusion, towards which all my arguments have been directed. It is this. Powers are delegated or reserved both to the state and federal governments to make laws. Under the concurrent power of taxation, they may each pass a law, both of which may be constitutional, and yet these laws may clash with, or impede each other. The same thing may happen in many other cases. For this clashing the constitution makes no provision. The right of passing constitutional laws which clash with the constitutional laws of congress, is not prohibited to the states; nor is the right of passing constitutional laws, which may clash with the constitutional laws of the states, prohibited to congress; because the evil of clashing, balanced, or checked powers, appeared to its framers, to be inconsiderable, compared with that of an absolute supremacy. I have called the first an evil, in a spirit of concession, but I think it the only security for the whole catalogue of social blessings; and not to be

* John Taylor, of Caroline, 66 *New Views on the Constitution*, pp. 240-241, 242-243; 1823.

counterpoised by a concentrated supremacy, which would be obviously a step towards consolidation and despotism. As the constitution has not provided for the clashing of constitutional laws, it may safely be demanded, by what authority either the state or federal legislative or judicial power, can abrogate one constitutional law because it clashes with another? After the people have invested two legislatures with the power of passing laws within specified orbits, who but themselves can circumscribe those orbits? If the constitutional rights and powers, established by the people between legislative, executive and judicial departments, and between state and federal departments, do in the language of the court *retard, impede, burden or controul* each other, where does the authority lie for removing the inconvenience, admitting it to be one; in the people, or in an implied supremacy of one of these departments, intended by the people to be controuled? If in the latter, the constitution is exposed to be altered by laws or adjudications without restraint. If in the former, then it can never be a question before any judicial department, whether a law is void because it retards, impedes, burdens or controuls another law; and the only chaste question is, whether or not the obstructing law is itself constitutional." *

APPENDIX 31C

(II Page 36)

THIS was not the reasoning of Mr. Madison and the makers of the Revolution of 1776.

And by so much as the doctrine established by that Revolution of the right of people to frame and unframe their own governments was established by that Revolution, by so much was the doctrine here preached by Mr. Madison weaker than that which he combated at the Revolution.

* John Taylor, "Construction Construed," pp. 173-174; Richmond, 1820. For other matter by Mr. Taylor to the same purport, *v.* Appendix 31D (on the Supreme Court).

Still less was this the language held by Mr. Madison at the dissolution of the Confederation.

Looked at from the viewpoint of result, such doctrine must terminate in the war which in the Federal Convention he deplored; and the necessity for which the doctrine of Secession obviates. But its true answer is to be found in his reply to Mr. Patterson, *ante*.

APPENDIX 31D

(II Page 41)

THAT there is a difference "between state secession and individual expatriation" is obvious. Yet it is to be remembered that the seceding State, in common with the expatriating individual, only takes out of the Union what belonged to it; it does not take territory belonging to the other States. Such an argument against secession needs but a little stretching to forbid the expatriation of a single citizen—whose loss to the Union might indeed in some instances be greater than that of an entire State; *e. g.*, Vattel says:

"Those workmen that are useful ought to be retained in the state; to succeed in retaining them, the public authority has certainly a right to use constraint, if necessary. Every citizen owes his personal services to his country; and a mechanic, in particular, who has been reared, educated, and instructed in its bosom, cannot lawfully leave it, and carry to a foreign land that industry which he acquired at home, unless his country has no occasion for him, or he cannot there obtain the just fruit of his labour and abilities. Employment must then be procured for him; and if, while able to obtain a decent livelihood in his own country, he would without reason abandon it, the state has a right to detain him." *

Mr. Newton, Mr. Jefferson, Mr. Edison, Mr. Wright, might thus have their liberty curtailed, and because of their value,

* "Laws of Nations," Book 1, Chap. VI.

be imprisoned. The practice is not uncommon among savages in regard to their civilized prisoners. It would be easy to formulate other objections to the right of expatriation upon this line, were Mr. Madison's argument granted. In argument from fundamental considerations of right and wrong the whole scheme of society may be readily subverted by almost any proposition logically followed without attention to counterpoising matters. In this particular case, a diametrically opposite, at least equally logical, and no more destructive, hypothesis, and one certainly more in line with the tendency of the Revolutionary thought, is furnished by Mr. Herbert Spencer, *viz.*:

"As a corollary to the proposition that all institutions must be subordinated to the law of equal freedom, we cannot choose but admit the right of the citizen to adopt a condition of voluntary outlawry. If every man has freedom to do all that he wills, provided he infringes not the equal freedom of any other man, then he is free to drop connection with the State . . . Upholders of pure despotism may fitly believe State-control to be unlimited and unconditional. They who assert that men are made for governments and not governments for men may consistently hold that no one can remove himself beyond the pale of political organisation. But they who maintain that the people are the only legitimate source of power—that legislative authority is not original, but deputed—cannot deny the right to ignore the State without entangling themselves in an absurdity.

"For, if legislative authority is deputed, it follows that those from whom it proceeds are the masters of those on whom it is conferred: it follows further that as masters they confer the said authority voluntarily: and this implies that they may give or withhold it as they please. To call that deputed which is wrenched from men whether they will or not is nonsense. But what is here true of all collectively is equally true of each separately. As a government can rightly act for the people only when empowered by them, so also can it rightly act for the individual only when empowered by him. If A,

B, and C debate whether they shall employ an agent to perform for them a certain service, and if, whilst A and B agree to do so, C dissents, C cannot equitably be made a party to the agreement in spite of himself. And this must be equally true of thirty as of three: and, if of thirty, why not of three hundred, or three thousand, or three millions?" *

But the true answer to this, as to other of Mr. Madison's objections, is to be found in the Constitution. Did that instrument interpose, either expressly or by the establishment of an arbiter, to counteract the law of nations in regard to leagues, as stated by Mr. Madison in answer to Mr. Patterson?

APPENDIX 31DD

(II Page 47)

THIS is a minor example of certain of his arguments, in explanation of which one willingly recurs to Mr. Madison's age, to the motives of patriotism which doubtless dictated them, or to one's possible misapprehension of their meaning. No one better than Mr. Madison could know that the opinion of the Legislature of Virginia of the acts of its almost half-century predecessor in bar of the opposite opinion of that of South Carolina, was of no more weight than that of any other individuals. To the contrary, its opinion in affirmation has a certain corroborative value; and it can scarce be doubted that Mr. Madison was aware that the Virginia House of Representatives of 1829 had reaffirmed in absolutely unmistakable terms that doctrine which Mr. Madison denied was intended by the Resolutions of '98; viz.:

"The proceedings of the Legislature of the State of Georgia, as well as those on which they are founded, emanating from the Legislature of South Carolina, announce and sustain the opinions of Virginia, heretofore proclaimed by successive Leg-

* *Social Statics*; edition of 1850.

islatures; opinions, which rest on truth and reason; which your committee can discern no cause to relinquish; but which they are ready to defend and sustain, as involving the most essential interests of the Commonwealth.

“Respect for the dignity and character of Virginia, and an anxious regard for the tranquillity of the Union, admonish your committee to withhold such remarks as might be suggested by the consciousness of oppression: such remarks could have no other tendency than to excite hostile emotions, ill adapted to the grave consideration of the momentous question which they are deputed to examine. Your committee will, therefore, proceed with calmness and temperance, to examine the opinion heretofore expressed by preceding Legislatures of this State, that the several acts of Congress, passed avowedly for the protection of domestic manufactures, are manifest infractions of the Federal Constitution, and dangerous violations of the sovereignty of the States. . . .

“This being the sense in which the Constitution of the United States was originally accepted, your committee have anxiously examined the record of succeeding time, to discover if any thing have since occurred, calculated to change the import of the instrument; and after the most patient examination, they confidently report, that nothing has transpired, which could in any manner modify its just construction. If at any succeeding period, attempts have been made to pervert the import of the original compact, Virginia has ever been prompt to avow her unqualified disapprobation, and manifest her undisguised discontent. The imperishable history of '98, has perpetuated the memory of her laudable zeal, in sustaining the true principles of the Constitution, in maintaining the sovereign rights of the States, in successfully resisting the lawless usurpations of a Government bent on the acquisition of boundless power. The deliberations of the Legislature of this Commonwealth, during the period of '98 and '99, in relation to the construction of the Constitution, by a felicitous combination of circumstances, resulted in a just and luminous exposition of the true principles of the Federal Court. This exposé clearly ascertained the just limitations of Federal

power, and happily pointed out to future generations, the just rule of interpreting the instrument. The construction then placed on the Constitution, was submitted to the decision of the most august of all tribunals, and sustained by the judgment of United America.

"The history of Virginia discloses several occasions, on which the Constitution was brought in review, and the committee have found that on every occasion where the question was involved, the former Legislatures of this Commonwealth have insisted on a limited construction of the instrument. Sustained by the concurrence of our predecessors, from the earliest history of the Constitution, your committee find but little difficulty in determining the Government of the United States, to be Federative in its character, and limited in its powers: That the powers vested in the Government, are conveyed in an express enumeration: That no power can be Constitutionally exercised, which is not contained in that enumeration: . . .

*"1. Resolved, as the opinion of this committee, That the Constitution of the United States, being a Federative Compact between sovereign States, in construing which no common arbiter is known, each State has the right to construe the Compact for itself."**

APPENDIX 31E

(II Page 51)

To render this ratiocination of Mr. Madison valid, it must be supposed that the Legislature of Virginia was so different from that of South Carolina that it could not be supposed guilty of the human fallibility of the latter (if fallibility its action showed); since that which Mr. Madison says,—that it cannot be believed that the former intended to do,—is that which he states the latter did do.

* Italicised by B. S. Preamble and Resolutions on the Subject of the Tariff Laws of the United States, Agreed to by both Houses, February 24, 1829; Acts of Virginia.

APPENDIX 31F

(II Page 81)

"It is not true, as a matter of reason or jurisprudence, that sovereigns may not enter into an indissoluble compact. *If sovereigns enter into a compact, and in such compact agree to refer all disputed questions arising under such compact to a specified tribunal*, it is not, and it never was since law and reason prevailed, the right of such sovereigns to withdraw from such compact, except by force. Compact, if it were in reality the basis of our Union, would not warrant secession." *

It is to be observed that Mr. Chamberlain puts the case conditionally; and it need only be said, that so put it is indisputable—and also implies that, lacking such provision of a tribunal, compact among sovereigns infers the right of each judging of its observance.

APPENDIX 31G

(II Page 81)

VARIOUS reasons appear against Mr. Madison's theory of the function of the Supreme Court. 1st, Mr. Madison states repeatedly:

"Between these different constitutional Govts.—the one operating in all the States, the others operating separately in each, with the aggregate powers of Govt. divided between them, it could not escape attention that controversies would arise concerning the boundaries of jurisdiction; and that some provision ought to be made for such occurrences. A political system that does not provide for a peaceable & authoritative termination of occurring controversies, would not be more

* D. H. Chamberlain, "Historical Conception of the Constitution," 1902; italicised by B. S.

than the shadow of a Govt.; the object & end of a real Govt. being the substitution of law & order for uncertainty, confusion, & violence.

"That to have left a final decision in such cases to each of the States, then 13 & already 24, could not fail to make the Constn. & laws of the U. S. different in different States was obvious; and not less obvious, that this diversity of independent decisions, must altogether distract the Govt. of the Union & speedily put an end to the Union itself. A uniform authority of the laws, is in itself a vital principle. Some of the most important laws could not be partially executed. They must be executed in all the States or they could be duly executed in none. An impost or an excise, for example, if not in force in some States, would be defeated in others. It is well known that this was among the lessons of experience wch. had a primary influence in bringing about the existing Constitution. A loss of its general authy. would moreover revive the exasperating questions between the States holding ports for foreign commerce and the adjoining States without them, to which are now added all the inland States necessarily carrying on their foreign commerce through other States.

"To have made the decisions under the authority of the individual States, co-ordinate in all cases with decisions under the authority of the U. S. would unavoidably produce collisions incompatible with the peace of society, & with that regular & efficient administration which is the essence of free Govts. Scenes could not be avoided in which a ministerial officer of the U. S. and the correspondent officer of an individual State, would have rencounters in executing conflicting decrees, the result of which would depend on the comparative force of the local posse attending them, and that a casualty depending on the political opinions and party feelings in different States," etc., etc.

"A political system that does not provide for a peaceable and effectual decision of all controversies arising among the parties, is not a Government but a mere treaty between independent nations without any resort for terminating disputes but negotiations and that failing," etc.

"A political system which does not contain an effective provision for a peaceable decision of all controversies arising within itself would be a Government in name only. Such a provision is obviously essential: and it is equally obvious that it cannot be either peaceable or effective by making every part an authoritative umpire," etc.

It is at least obvious, as Mr. Madison states, that such a point "could not escape attention." Were proof needed of this fact, the various rejected proposals for Federal control over the States would furnish it. It is so obvious that the lack of any such control stated in unmistakable language, is indeed the strongest argument that the states refused to grant it. As Mr. Chas. Francis Adams says, "To whom was allegiance due in cases of direct issue and last resort?—on this crucial point of points the Constitution was not self-explanatory, explicit. Nor was it meant to be. The framers—that is, the more astute, practical and farseeing—went as far as they dared. The difficulty—the contradiction involved—was explicitly, and again and again, pointed out. It is impossible to believe that a man so intellectually acute as Hamilton failed to see the inherent weakness of the plan proposed . . . Madison . . . seems really to have had faith in the principle of an unstable political equilibrium. At a later day that faith was put to a rude test. . . . He had all he wanted of a divided sovereignty in practical operation!" * It is impossible to conceive that had the Convention's plan intended a control by decisions of the Supreme Court, such a vitally important matter should have been left to be deduced by construction. To apply to this case the language of Judge Gibson: †

"Had it been intended to interpose the judiciary as an additional barrier, the matter would surely not have been left in doubt. The judges would not have been left to stand on the insecure and ever shifting ground of public opinion as to constructive powers; they would have been placed on the impregnable ground of an express grant. They would not have been

* "The Ethics of Secession."

† *Eakin et al. vs. Raub et al.*

compelled to resort to the debates in the Convention, or the opinion that was generally entertained at the time."

As put by another writer :

"If the makers of that instrument really foresaw what they were doing, and the consequences involved, and yet left such questions to be determined as they have done, with no provision for what might occur while the legislation was undisputed, anything more unfinished than their work can be scarcely mentioned. But intended or not, is it not a power that is to be ascertained to exist by reasoning, and reasoning only? Why is the judiciary the only branch of government, whose views as to the powers they possess by the grant, are to be regarded? If this be not implication and inference, and the exact converse of an express grant, I am at a loss for a meaning to these words.

"Therefore, it seems to me plain that as it has been demonstrated for seventy years, and acquiesced in by all, that one of the most important functions of the government, nothing less than a control over legislatures, executives, and the sovereignties which formed the United States, has been created and lodged by inference, and by inference only, in one branch of that government, uncontrollable by the united powers of the imperial State and of the States which constituted the *imperium*, and this has been done without any reference to the subject in the Constitution, and probably as to one branch of the subject (the right to determine the illegality of State legislation), without any person concerned in the matter, seeing that it had been done, is it impossible that other high powers may be found to have been similarly granted?" *

A recent writer says :

"What would be regarded to-day as one of the most significant questions that confronted the Constitutional Convention was, however, left unsettled. The whole issue was either

* Richard C. McMurtrie, "Plea for the Supreme Court."

intentionally or unintentionally left open for future solution." *

While, however, it is certain that no express sanction appears on the face of the instrument for judicial any more than other Federal control, it is not necessary to adopt the supposition that it was thus intended to leave the issue open for future solution. Not to grant any Federal control settled it on the negative side according to that Constitutional provision that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." It seems unsettled only because of later developed ideas. Men such as Mr. Adams taking it for granted that such control is necessary, argue backward from that idea to the postulate that the lack of it is "an inherent weakness of the plan." It *was settled* to the satisfaction of the, then dominant, school of Messrs. Taylor and Jefferson,† who considered it the essential strength of the plan.

Mr. Madison's arguments may, or may not, be true as to political results, but it can be historically proven that they are invalid as supporting the function which Mr. Madison desires to attribute to the Supreme Court. For they are the same which he used in the Federal Convention in support of a Federal negative on State laws, the grant of which was nevertheless refused.

Speaking in that Convention, July, 1787,

"*Mr. Madison* considered the negative on the laws of the states as essential to the efficacy and security of the general government. The necessity of a general government proceeds from the propensity of the states to pursue their particular interests in opposition to the general interest. This propensity will continue to disturb the system unless effectually controlled. Nothing short of a negative on their laws will control it," etc.

* Charles G. Haines, "Conflict over Judicial Power," p. 37; N. Y., 1909.

† *Vide* citations from these gentlemen.

On June 8, he had advocated a Federal negative as the only alternative to Federal coercion.

"He could not but regard an indefinite power to negative legislative acts of the states as absolutely necessary. . . . Experience had evinced a constant tendency in the states to encroach on the Federal authority; to violate national treaties; to infringe the rights and interests of each other; to oppress the weaker party within their respective jurisdictions. A negative was the mildest expedient that could be devised for preventing these mischiefs. . . . Should no such precaution be engrafted, the only remedy would be in an appeal to coercion," etc.

Had Mr. Madison thought that the Constitution "had guarded against such fatal consequences by giving to the judicial authority of the U. S. an appellate supremacy," why advocate a Federal negative as the only alternative to armed coercion? But since these reasons did not induce the States to yield to one department of the Federal Government, the power of a negative over their laws, how suppose that they induced them to surrender that power to another department of the same?

"It surely does not follow from the fact of the states, or rather the people embodied in them, having, as parties to the constitutional compact, no tribunal above them, that, in controverted meanings of the compact, a minority of the parties can rightfully decide against the majority, still less that a single party can decide against the rest, and as little that it can at will withdraw itself altogether from its compact with the rest."

But according to Mr. Madison's answer to Mr. Patterson, such a result from such a condition necessarily follows.

How is Mr. Madison's statement of the standing of the parties to the Constitutional compact consistent with Mr. Madison's doctrine of the power of the Supreme Court, as a provision "for a peaceable and effectual decision of all controversies arising among the parties?"

The Resolutions of '98, according to Mr. Madison, seem aimed against the powers of the Supreme Court, "to provide for a peaceable and authoritative termination of occurring controversies" between nations or States.

It is difficult to reconcile the statement that "the powers of the Federal Government assigned by the Constitution require a supremacy of them over the powers reserved to the States; *a supremacy essentially involving that of exposition as well as of execution; for a law could not be supreme in one depository of power if the final exposition of it belonged to another,*" and the statement that "the object of Virginia was to vindicate legislative declarations of opinion; to designate the several constitutional modes of interposition by the states against abuses of power, and to establish the ultimate authority of the States as parties to and creatures of the Constitution to interpose against the decisions of the judicial as well as the other branches of the Government—the authority of the judicial being in no sense ultimate, out of the purview and form of the Constitution."

The Resolutions and Report assert:

"But it is objected, that the judicial authority is to be regarded as the sole expositor of the Constitution in the last resort . . . On this objection it might be observed, first: that there may be instances of usurped power, which the forms of the Constitution would never draw within the control of the Judicial department: secondly, that if the decision of the judiciary be raised above the authority of the sovereign parties to the Constitution, the decisions of the other departments, not carried by the forms of the Constitution before the Judiciary, must be equally authoritative and final with the decisions of that department. But the proper answer to the objection is, that the resolution of the General Assembly (of Virginia) relates to those great and extraordinary cases, in which all the forms of the Constitution may prove ineffectual against infractions dangerous to the essential rights of the parties to it. The resolution supposes that dangerous powers not delegated, may not only be usurped and executed by the other departments, but that the Judicial department, also, may

exercise or sanction dangerous powers beyond the grant of the Constitution; and, consequently, that the ultimate right of the parties to the Constitution, to judge whether the compact has been dangerously violated, must extend to violations by one delegated authority, as well as by another; by the Judiciary, as well as by the Executive, or the Legislature.

"However true, therefore, it may be that the Judicial department is, in all questions submitted to it by the forms of the Constitution, to decide in the last resort, this resort must necessarily be deemed the last in relation to the authorities of the other departments of the Government; not in relation to the rights of the parties to the Constitutional compact, from which the Judicial as well as the other departments hold their delegated trusts. On any other hypothesis, the delegation of judicial power would annul the authority delegating it; and the concurrence of this department with the others, in usurped powers, might subvert forever, and beyond the possible reach of any rightful remedy, the very Constitution which all were instituted to preserve. . . .

"The resolution having taken this view of the Federal compact, proceeds to infer, 'That, in case of a deliberate, palpable, and dangerous exercise of other powers, not granted by the said compact, the states who are parties thereto, have the right and are in duty bound to interpose for arresting the progress of the evil.' It appears to your committee to be a plain principle, founded in common sense, illustrated by common practice, and essential to the nature of compacts, that where resort can be had to no tribunal superior to the authority of the parties, the parties themselves must be the rightful judges in the last resort, whether the bargain made has been pursued or violated. The constitution of the United States, was formed by the sanction of the States, given by each in its sovereign capacity. It adds to the stability and dignity, as well as to the authority of the constitution, that it rests on this legitimate and solid foundation. The states, then, being the parties to the constitutional compact, and in their sovereign capacity, it follows of necessity, that there can be no tribunal above their authority, to decide on the last resort, whether the com-

pact made by them be violated; and, consequently, that, as the parties to it, they must themselves decide in the last resort, such questions as may be of sufficient magnitude to require their interposition."

Again:

"That this Assembly doth explicitly and peremptorily declare, that it views the powers of the federal government as resulting from the compact to which the states are parties, as limited by the plain sense and intention of the instrument constituting that compact, as no further valid than they are authorized by the grants enumerated in that compact; and that, in case of a deliberate, palpable, and dangerous exercise of other powers, not granted in the said compact, the states, who are parties thereto, have the right, and are in duty bound to interpose, for arresting the progress of the evil, and for maintaining, within their respective limits, the authorities, rights, and liberties, appertaining to them."

This is in harmony with Mr. Madison's remark in the debates in the Federal Convention:

"Mr. Madison doubted whether it was not going too far, to extend the jurisdiction of the court generally to cases arising under the Constitution, and whether it ought not to be limited to cases of a judiciary nature. The right of expounding the Constitution in cases not of this nature ought not to be given to that department."

But it is much less in harmony with his later view of the function of the Supreme Court than were the answers of the various States, rejecting the Virginia Resolutions and asserting reliance upon the tribunal of the Supreme Court as the proper authority for the decision of the constitutionality of the acts therein protested.

Not only then does Mr. Madison fail to refer to the only authoritative arbiter, the text of the Constitution, in support of his doctrine, but his sole argument, the assumption that such provision is so obviously necessary that it must have been made is exceptionable from every point of view, being against

his doctrine, not corroborative of it, inconsistent with other parts of his own creed, and insusceptible of proof as to its assertions.

Another objection is the apparent inconsistency of such a function in the Court, with the nature of the Constitution. This objection is ably presented in the works of Mr. John Taylor of Caroline, which should be read in this connection. Some citations therefrom follow, but reasons of length forbid that entire quotation necessary to present Mr. Taylor's argument in its full strength.

"Fed. p. 72. M[adison]. 'The jurisdiction of the general government, is *limited to certain enumerated objects*, which concern all the members of the republick, but which are not to be attained by the separate provisions of any.'

"Fed. p. 208. M[adison]. 'The local or municipal authorities form *distinct and independent* portions of the *supremacy*, no more subject within their respective spheres, to the general authority, than the general authority is subject to them within its own sphere.' In the same page, however, Mr. Madison makes what the lawyers call an *obiter* observation, that is, he drops an opinion by chance, apparently without due consideration. 'It is true,' says he, 'that in *controversies* relating to the boundary between the two jurisdictions, the tribunal which is ultimately to decide, is to be established under the general government.' Perhaps I mistake his meaning. If he mean, 'controversies between two state jurisdictions,' I admit that their decision is vested in the federal judicial power. But if, as I confess it appears to me, he meant 'that the federal judicial power was vested with a right of deciding controversies between itself and the judicial power of the states,' I must with much confidence, yet with great respect, differ with him in opinion. The point ought to be determined by the constitution itself. Mr. Madison asserts that, 'the jurisdiction of the general government is *limited to certain enumerated objects*.' Is this case comprised within that enumeration? Is it said, generally, 'that the state judicial sphere shall be subject to the controul of the federal judicial sphere? Or is it said,

specially, that controversies as to jurisdiction between these two spheres shall be decided by one of the parties? Are controversies between the state and federal legislative spheres to be also decided by one of the parties? neither conclusion can consist with the preceding opinion of Mr. Madison, that 'the local or municipal *authorities* form *distinct* and *independent* portions of the *supremacy* *no more subject* within their respective spheres, to the *general authority*, than the general authority *is subject to them* within its own sphere.' However, therefore, we shift our words or phrases, in describing the powers delegated to the federal government and reserved to the states; whether we call them sovereign, supreme, legislative, executive or judicial; they still retain their spherical, limited, co-ordinate and independent nature, in relation to each other, according to the construction of contemporary writers of the best authority.

"Fed. p. 456. H[amilton]. 'There is not a syllable in the plan which directly empowers the national courts to construe the laws according to the spirit of the constitution, *or which gives them any greater latitude in this respect, than may be claimed by the courts of every state.*' Unequivocally rejecting the idea of judicial spherical subordination.

"But this constitutional question is deliberately and distinctly stated, apparently upon the most profound consideration, in a style, and with a precision, which it would be presumptuous in me to defend, in certain resolutions of the Kentucky legislature, passed in the year 1798, said to have been drawn by Mr. Jefferson, and bearing internally, evidence of flowing from an enlightened mind. The first is in these words: —'Resolved, that the several states composing the United States of America, are not united on the principle of unlimited submission to their general government; but that by compact under the style and title of a constitution for the United States and of amendments thereto, they constituted a general government for *special purposes*, delegated to that government certain *definite powers*, *reserving each state to itself the residuary mass of right to their own self-government*; and that whensoever the general government assumes *undellegated* powers, its

acts are unauthoritative, *void and of no force*: That to this compact each state acceded as a state, and is an integral party, its co-states forming, as to itself, the other party; that the government created by this compact *was not made the exclusive or final judge of the extent of the powers delegated to itself*; since that would have made its discretion, and not the constitution, the measure of its powers; but, that as in all other cases of compact among parties having no common judge, *each party has an equal right to judge for itself*, as well of infractions as of the measure of redress.' The co-ordinacy of institution, the independence of each other, and the mutuality of the right of construing the federal constitution, are thus recognised and asserted, as existing in the federal and state governments; and the principle, which pervades the whole, must also pervade the parts. If the entire federal government possesses no supremacy over, and can require no subordination from the entire state governments, whilst acting within their respective spheres, no part or department of that government can exert a supremacy over, or exact a subordination from, the corresponding parts or departments of the state governments. The federal legislature having no supremacy over the state legislatures, the federal judicial power can have no supremacy over the state judicial power. The same prohibition of such claims, co-extensively forbids to both an enlargement of power by trespassing on the state sphere or state departments. It arises from the limited powers bestowed on the legislature and judiciary of the federal government, and *the reservation of the residuary mass of rights to the states*.

"With this construction, the oath of office prescribed by the federal constitution is a remarkable coincidence. Both legislators, judges and other officers, of the state as well as the federal governments are required to take an oath to support the federal constitution; but neither federal legislators, judges nor other officers, are required to take an oath to support the state constitutions. The reason of this distinction is, the state legislators, judges and officers, have some duties assigned to them by the federal constitution, and would necessarily have others, arising from the laws of the United States; but, that

federal legislators, judges or officers, having no duties to discharge under the state constitutions or laws, but being confined within the limited spheres defined by the federal constitution, no allegiance to state constitutions was necessary on their part. I cannot imagine a power more inconsistent with republican principles in general, and with ours in particular, than that claimed over the state laws, and consequently over the state constitutions, by the supreme federal court. It is under no obligation or responsibility of any kind to respect either. If it should violate its legitimate federal or spherical duties, it violates its oath; and is liable to trial and removal from office. But, in virtue of its supposed supremacy over the state courts, it might be tempted to annul state laws, to advance the power of congress, by whom it is paid and tried; and it might alter the institutions of the people according to its own pleasure, without even breaking an oath. The case is analogous in all its aspects to the claim of the British parliament, neither bound by an oath, nor elected, nor paid, nor removable by the people of the colonies, over the legislatures of these colonies; which were elected, paid and removable by the people, and also bound by an oath. A judicial power, though under the obligation of an oath, paid by the king of England, was justly considered in Massachusetts, as an outrage upon the principles of justice and liberty. It was a feather to one, created by and accountable to a native distinct government, emulous (as is the nature of man) of power, possessing a supreme power, over the laws of a collateral government, without being under any influence or responsibility to observe those laws.

“But cannot judges declare unconstitutional laws void? Certainly. Constitutions are only previous supreme laws, which antecedently repeal all subsequent laws, contrary to their tenor; and the question, whether they do or do not repeal or abrogate such subsequent laws, is exactly equivalent to the question, whether a subsequent repeals a previous law. Therefore, judges, juries and individuals have a correspondent power of deciding this question in all legitimate occurrences. But the constitutionality of state laws cannot legitimately be

decided by the federal courts, because they are not a constituent part of the state governments, nor have the people of the state confided it to the state courts, under the securities of an oath, and of various modes of responsibility. The people also have confided to the federal courts a power of declaring an unconstitutional federal law void, under similar securities; but where such a power is neither bestowed by the people, nor any security against its abuse provided, its assumption by inference is repelled by the absence of every regulation for moderating its exercise. In fact, the spheres of action of the federal and state courts are as separate and distinct, as those of the courts of two neighbouring states. Because the judges of each state are empowered under certain regulations to declare a law of their own state void, it does not follow, that the judges of another state can abrogate it. The federal judges owe no allegiance to the state governments, nor are more a component part of them, nor are more responsible to them, than the judges of a different state. Ramsay's *United States*, Vol. I, p. 202. 'Great Britain contended, that her parliament, as the *supreme power*, was constitutionally invested with an authority to lay taxes on every part of the empire.' 'If the British parliament, said the colonies, in which we are *unrepresented*, and *over which we have no controul*, can take from us any part of our property, they may take as much as they please, and we have no security for any thing that remains.' p. 303. 'That by the *novel doctrine* of parliamentary power, they were degraded from being the subjects of a king, to the low condition of being *subjects of subjects*.' p. 306. 'Where *parliamentary supremacy ended*, and at what point *colonial independence began*, was not ascertained.' p. 307. 'The *omnipotence* of parliament was so *familiar* a phrase, that few in America, and still fewer in Great Britain, were impressed, in the first instance, with the illegality of taxing the colonies.' Let us parody this quotation. The federal court contends, that as the *supreme power*, it is constitutionally invested with an authority to abrogate state laws, and contract state revenue. If, say the states, this court, *over which we have no controul*, can take from us any law, or any revenue, it may take away

as many or as much as it pleases, and we have no security for retaining any. By the *novel doctrine* of federal judicial supremacy, we are degraded from the right of internal self-government, to the low condition of being *subjects of subjects*. Where the federal *jurisdiction ends*, and where *state jurisdiction* begins, is ascertained by the federal constitution, but the *omnipotence* of federal supremacy, legislative and judicial, may become so *familiar* a phrase, that few may be impressed, *in the first instance*, with the consequences to which it tends, or the evils in which it may terminate." *

"The next quotation will demonstrate the struggle between an inveterate opinion, candidly and honourably avowed by Mr. Hamilton in the convention, and the plain intention of the constitution.

"H. No. 28. (of *Federalist*) 'In a confederacy, the people, without exaggeration, may be said to be entirely the masters of their own fate. Power being almost always the rival of power, the *general* government will at all times stand ready to check the usurpations of the state governments; and these will have the same dispositions towards the general government. The people, by throwing themselves into either scale, can make it preponderate. If their rights are invaded by either, they can make use of the other, as the instrument of redress. How wise it will be in them, by cherishing the union, to preserve to themselves an advantage which can never be too highly prized.'

"'It may safely be received as an axiom in our political system, that the state governments will in all possible contingencies, afford complete security against invasions of the public liberty by the *national* authority. Projects of usurpation cannot be masked under pretences so likely to escape the penetration of select bodies of men, as of the people, at large. The legislature will have better means of information; they can discover the danger at a distance; and possessing all the organs of civil power, and the confidence of the people, they can at once adopt a regular plan of opposition, in which they

* John Taylor, of Caroline, "Construction Construed," pp. 132-137; Richmond, 1820.

can combine all the resources of the community. They can readily communicate with each other in the different states; and unite their common forces for the protection of their common liberty. If the federal army should be able to quell the resistance in one state, the distant states would have it in their power to make head with fresh forces. The people are in a situation, through the medium of their state governments, to take measures for their own defence, with all the celerity, regularity, and system, of *independent nations*.'

"But of what use is this eulogised capacity in state legislatures to discover usurpations, if they cannot constitutionally resist them; and how can they resist usurpations, if they are subjected by the constitution to a sovereignty or supremacy in the usurper? The people of each state are recognised as independent nations; and the state governments, not as judicial, but as political departments, intended to watch over the constitutional rights of these nations, and invested with a power to resist federal usurpations. They are recognised as possessing all the organs of power necessary to discharge the important duty of breaking the snares of tyranny, by which the people are frequently caught, for want of the means of discovering the danger, which these select bodies of men possess. It is even admitted that the state governments may form regular plans of opposition, and appeal to arms for the defence of their rights. But what becomes of this whole fabrick intended by the constitution to preserve the rights and liberty of the people, if the federal government is sovereign, or the federal court supreme? What becomes of the essential right in these independent nations to control their governments for the preservation of the union if these governments cannot control a sovereignty or supremacy, usurped for the purpose of destroying the union by a consolidated national government? Of what value is the responsibility of state governments to the people, when it is liable to be rendered inefficient by a supremacy in a federal court? How can the people cherish or preserve the union, if its preservation depends on this court, and not on their state governments? What good can the people reap from the intelligence and foresight of their

state governments, if the supreme mandate of this court can forbid them from seeing or resisting usurpations? Where lies the mutual check between the two governments, if a supreme power to expound the articles of the union, is thrown into the scale of one by construction? By this contrivance, the influence of the people over their state governments, urged as necessary for the preservation of their rights, both state and federal, is transferred from them to a federal court. The state governments may still 'adopt regular plans of opposition.' Opposition must therefore be constitutional. They may even oppose armies to armies. Why then may they not array laws against laws, and judgments against judgments? This is the very remedy contemplated by a system compounded of co-ordinate and divided powers, against wars with guns and bayonets. Whence arises the state right to resist usurpation, to form regular plans of opposition, and to watch over the liberty of the people by organised governments, except from the sovereignty and independence attached to the powers reserved, and the inherent mutual right of self-defence attached to each division of power, state and federal. But the two formidable words 'national and general,' still tingle in our ears, and protrude themselves against these concessions. I protest against them, because they are not in the constitution, although they have been drawn from the recess of the convention, borrowed from a rejected plan of government, introduced by the high authority of the *Federalist*, and accepted with avidity by the consolidating school. In contending that we have neither a national nor a general government, nor a national nor a federal sovereignty, nor a judicial supremacy, it is necessary to point out the inconsistency between allowing great political powers to the states, and rescinding them by these illegitimate expressions." *

"No derived power can be greater than the primitive power. No state, nor a majority of states, had any species of primitive sovereignty or supremacy over other states. Elections by states, therefore, cannot confer upon a majority of congress

* John Taylor, of Caroline, "New Views on the Constitution," pp. 69-72; 1823.

a supremacy never possessed by a majority of states, especially as from the form of the senate, the representatives of a minority of people may pass a law, and this representation of the minority might, if it possessed a legislative supremacy, exercise a sovereign power over the majority. If federal legislatures do not possess an absolute supremacy, federal judiciaries cannot possess it, since judgments cannot enforce that which is not law. In conformity with this reasoning, neither federal legislative majorities, nor a majority of the states, can amend the constitution, because it was a compact by which each state delegated for itself only limited powers to the federal government; attended by a supremacy not of any political sphere, but of the constitution, limited and confined to the powers delegated, and not extending to the portion of primitive state supremacy, never delegated. Thus it happened, that no state was bound by the constitution, until it had acceded individually to that compact. And hence it results, that the right of construing the constitution within their respective spheres, is mutual between the state and general governments, because the latter have no supremacy over the state powers retained, and the former no supremacy over the federal powers delegated, except that which provides the stipulated mode for amending the constitution.

"It is objected, that if the supreme federal court do not possess an unlimited or unchecked supremacy in construing the constitution, clashing constructions will ensue. This is true, and yet it is not a good reason for overturning our system for dividing, limiting and checking power, if that system be a good one; and if it be even a bad one, the people only, and neither one of their departments separately, nor all united, can alter or amend it. The objection applies as strongly to the other departments of our government, as to the judicial. If the federal legislature and executive do not possess an absolute supremacy over the state legislatures and executives, clashing constitutional constructions will ensue. The jurisdiction of the federal judicial power is as expressly limited, as the legislative and executive federal powers. There is no judicial supremacy recognized in the supreme federal court, except

that over inferior federal courts. And, if the supremacy of the constitution bestows upon any federal department a supremacy over the correspondent state department, it must bestow upon every federal department, a similar supremacy over the other correspondent state departments." *

"But, passing by the claim of the Supreme Court to a negative or restrictive power over the State governments, in the exercise of their reserved powers, as too inconsistent with the representative principle even to have been proposed by the admirers of the English policy themselves, the project of investing Congress with this power, though rejected by the convention, is again forced upon our consideration. It is said, that it is safer to rely upon the elective principle, when exercised by all the States, than when exercised by one. I deny that this assertion is either constitutionally or logically maintainable. Not constitutionally, because the elective principle is co-extensively used and relied upon for the preservation both of State and Federal rights, and instead of intending that one moiety of this principle shall swallow up the other, each moiety had a distinct office assigned to it: one-half was to superintend Federal powers, and the other half State powers. The elective principle in one State never had a right, moral or actual, to control the elective principle in another State, and having no such power itself, it could not convey such a power either to Congress or the Supreme Court. The people of all the States, far from claiming a power over the elective principle in each State, have themselves, if they are to be considered as collectively the authors of the Constitution, explicitly reserved it to themselves for the regulation and superintendence of the State powers also reserved. If such was not the case, if the State powers reserved and the elective principle were bestowed by the people of all the States, the people of no State would have the right to alter their constitutions, or control their governments, because these constitutions and the powers of the State governments were established by the supreme authority of the people of all the States. The supreme authority which

* John Taylor, of Caroline, "Construction Construed," pp. 143-144; Richmond, 1820.

reserved State powers, could only modify or take them away, and, until this is done, each State government would have a right to hold and exercise under the authority of the people of the United States, exactly the powers, neither more nor less, reserved to it by this supposed supreme power of the people of all the States, over the people of one State; because the inferior elective principle could have no right to undo that which the superior elective principle had established. But if this supreme elective principle in the people of all the States over the elective principle in each State, as to reserved State rights, never did exist and never was recognised, then, as to these reserved rights, the elective principle in one State remains independent of the elective principle in every other, and possesses the inherent moral right of individual self-defence.

"But how can the posture masters of words, dispose of the clear and explicit term 'respectively' used in amendment of the constitution? Could a plainer have been found in the English language to express its meaning? Powers are reserved to the United States 'respectively.' Whatever these were, they were reserved by this expression separately and not collectively to the States. Either the right of internal self government was among them, or no State has any such right. Among them, also, was the unimpaired right of election in the people of each State, for the purpose of local State government, or the people of no State have any such right. The people of each State held no other power which the reservation could secure. The reservation of this right, would have been quite nugatory, coupled with a power in Congress and the Supreme Court to render it inoperative. State local rights, being reserved separately to each State, cannot be either preserved, or taken away by the States collectively; and a right of separate preservation must attend each separate reservation, or the reservation is void. Many men have no authority to defend one man's title to his estate. Massachusetts could not resist the aggression upon the local law of Virginia by the Supreme Court in the lottery case, nor that upon the local law of Ohio in the bank case. It was for this unanswerable reason, that the right of internal self government was reserved to the States separately or re-

spectively. There existed no medium between this separate reservation, and a consolidated republick which was proposed and rejected. Had the constitution, after having reserved the right of internal self government to the States, or the people 'respectively,' added, 'but Congress or the Supreme Court shall have a power to control this reservation to the States or to the people, respectively,' it would have been an absurd contradiction, and the same absurdity attends such a construction of the constitution. If the States respectively, cannot resist aggressions, respectively or separately made upon the separate right of each to internal self government, they cannot be resisted at all; because the right being separate, the resistance must necessarily be separate also, or a consolidated republick must ensue. To prevent this, the reservation was to the States 'respectively.' The elective power in all the States, had no original right to control the elective power in each State, or to regulate its government either externally or internally. As to the former only, the separate elective powers of the States were united; but as to the right of internal self government, the separate elective power of each State was left untouched by the limitation of powers confided to the Federal government; and also by the positive reservation. With respect to local State government, the States were left in the same relation to each other, which existed previously to the Union; and since this relation never invested the people of all the States, with any power to regulate the internal government of one State, the people of all the States could not invest Congress or the court with a power which they had not themselves; nor could Congress by a judicial law, invest the Supreme Court with the same power. It seems therefore, quite certain, that this project for introducing a consolidated republick, is literally inconsistent with the amendment, intended to preserve a federal republick.

"The expediency of investing Congress or the court, or both, with a negative power over the local acts of the State governments, opens a wider field for reasoning. If it is conceded that fellow-feeling and responsibility bestow on representation all its honesty and all its value, it must inevitably follow, that the principle of election, as exercised by all the States in refer-

ence to the Federal government, does not possess either of these essential characters of representation, in reference to the State governments. These do not exercise their reserved rights in one mode, nor adopt the same internal regulations. It cannot therefore often happen, that a conflict will take place between federal and reserved powers, which involves all the States equally; and it will but seldom happen that more than one State at a time will have occasion to resist an aggression upon its reserved rights, on account of the dissimilarity between the laws of the States respectively. In such cases the people of the other States possess neither of the essential characters of representation as to the State attached; and, therefore, by their election, they could not infuse these characters into their representatives. By considering the people of the other States or their representatives, as a representation of the people of the injured State, the great principles of election and representation for the freedom and security of internal State government, would be completely destroyed. It is obvious that sympathy and responsibility as to internal laws would be thus obliterated, or at least too feeble to repel particular aggressions upon the right of internal self-government, and that if some inoperative sympathy might exist, there would not exist a vestige of responsibility in the people of the other States, or in representatives chosen by them, to the people of the injured State. Neither of them feel an internal State law. By substituting this fungus of representation, this metaphysical prolusion, this oyster-like substratum, without an organ of active vitality, as a foundation for State rights, and the solitary security for a federal government, instead of State election and representation, the constitution is supposed to have created two of the most effectual weapons for the destruction of both which could have been devised. One is a maxim—Divide and conquer. Division is an inevitable security for victory, if the Federal government should be prudent enough to assail State rights successively, as indeed it must generally be, from the unconnectedness of State legislation. But as if this weapon was not sufficient for their demolition, it is rendered inevitably fatal by the superadded doctrine, that

no one of these divisions, no single State when assailed, shall possess the right of self-defence, but must stake its existence or liberty on volunteers uninfluenced by fellow-feeling or responsibility, and who may possibly be influenced by adverse local prejudice. If it is admitted that a division of Federal and State powers can alone prevent a consolidated republick, that this species of government threatens us with a worse, and that a genuine representation of local State rights is necessary to sustain this division; it is evident that this representation must be of the States 'respectively,' or that the end cannot be effected. A proof of this conclusion results from considering the nature of the united representation of the States. There is great ingenuity in eluding this proof. We are told that it is the people of all the States; and that the people of all may be more safely relied upon to preserve both State and Federal rights, than the people of one. This is very plausible. Federal representation is the people, therefore we have already a consolidated republick; because the people of all the States are sovereign, representation is the people, and sovereignty can do any thing. The guardianship of State rights, reserved to the people of each State respectively, is thus transferred exclusively to Congress, which may again transfer it to the Federal court, and the work of introducing a consolidated republick is dexterously finished. But what were the powers which confederated? If they were not both something and also distinct, they could not have confederated. If they were any thing, they were different societies of people. The existence of societies supposes a sovereignty in each society, and this sovereignty can only be found in the people of each State as associated. If the Constitution is not a confederation, but the work of all the people of all the States, acting individually and not in an associated capacity, they yet thought it expedient for the preservation of their own liberties, to establish a Federal government for some purposes, and State governments for others; and resorted to representation for effecting both objects; but it is now urged that in this they acted unwisely; and thus we are brought back to the old question of a consolidated republick, considered and rejected by the people themselves;

if the convention was the people, and the project secretly proposed is now openly advocated, not in a convention, but by unknown, avaricious, or ambitious individuals.

“The most recondite artifice and contradiction, and yet the most effectual for destroying the division of power once thought to be expedient and wise, couches under the great argument used to effect this object. Shall the people of one State construe the constitution for the people of all the States? The ingenuity of this argument consists in its capacity for receiving, from the advocates of a consolidated republick, the answers both no and yes. If the question is divided, and they are first asked, whether one State can defend its reserved rights, they answer No; but if they are asked whether Federal powers can be extended, through the instrumentality of one State, they answer Yes. In this case one State may construe the constitution for all the States, because it will advance the project of a consolidated republick; but not in the other, because it will sustain a federal republick. Thus, if one State submits to have one of its reserved powers questioned, tried, and abolished by the Federal court, this submission and decision becomes a precedent for construing the constitution, though the act of one State only; and is binding on all the States in the eyes of the consolidating project, though they were not parties to this species of political or constitutional law-suit, any more than they would be parties to a political collision between the Federal and a State government. Accordingly the bank suit of Maryland is to bind Ohio, and the lottery suit of Virginia is to bind all the other States. It might even happen that some interested but secret motives might, by these law-suits, bring in question State powers, with an apparent affectation of defending them, but a real intention of losing them; and that thus these State powers might be gradually retrenched and finally destroyed by the collusions of individuals. In point of wisdom, safety, and expediency, which is best—to depend upon *ex parte* or collusive law-suits for the construction of the constitution, which may alter it without the consent of the people or the States; or to depend upon the elective power of the people of each State, to keep

their representatives within the bounds of the constitution? By one mode of construing the constitution, the right of internal self-government is lost to all the States; by the other, all retain it, because the resistance of one State to an unconstitutional aggression, leaves the rest free to use their own judgments, and to resist or not, according to their own will, should they also be attacked. But the mode of making constitutions as common law is made, by precedents made by judges, is conclusive upon the States, without any exercise of their judgments at all. If inconveniences may attend the right of a State to construe the constitution; which are however more speculative than real; yet it may be better to suffer them, then [sic] to incur the misfortune of a consolidated republic; or at least inferior to those which will arise from suffering the Supreme Court by the instrumentality of one State, or some faction, or some individual fraud, to splinter the constitution. Election is a powerful remedy against inconveniences arising from the former policy; it is none against those arising from the latter. It would be strange, whilst we cling to the idea of representation in making laws, that we should imagine it to be unwise in making constitutions. Ambition however has always thought it highly inconvenient. Here, as is commonly observable in the freest countries, it is particularly ingenious. It proposes to destroy a real and active majority, by the idea of an imaginary and inactive majority; and a representation in fact, by pretending that it will produce more inconveniences than no representation at all. According to this recent doctrine, no one political department can vindicate the powers committed to it by the conventional majority, because no one department represents a majority of people in all the United States. This conventional majority being dead, and incapable of current use, is however made to furnish an idea with which to destroy the rights of the political departments created by it when alive. But the argument proves too much for those who use it. The climax by which it is brought out is this. The constitution is the act of the people of the United States; those representing a majority of these people, have the exclusive right of construing it; but the State governments do not repre-

sent this majority; and therefore they cannot construe it at all. If the argument is sound, the conclusion is, that as no political department represents a majority of the people of the United States, none can construe the Constitution. The legislative Federal department is far from doing so, from the construction of the Senate; and the House of Representatives is only one constituent of that department, of itself, imbecile. The argument, however, is unsound under any policy, by which a majority establishes divisions of power, because the checks and balances of such a policy are exercised, not by departments representing a majority, but by departments acting under the authority of the majority which created them; and if these divisions are deprived of the right of self-preservation, by which only such checks and balances can effect the objects intended, it is, under a feigned submission, an actual rebellion against the majority by which they were established. Therefore the powers of the States being bestowed or reserved by a majority of the States or of the people, no matter which; any State would disobey the majority, and thus betray the national right of self-government in the federal form, by suffering itself to be deprived of these powers. A division and a consolidation; checks and no checks; cannot exist together. Political checks are designed to counterpoise each other, and the majority which creates them, never intends that a pretended veneration for an inoperative idea of itself, should defeat its own precautions to preserve its own liberty. The majority which made the Federal Constitution, defined the only modes by which a majority for altering it could be brought into operation, and this definition proves that an inoperative idea of a speechless majority, was not contemplated as sufficient to destroy the divisions of power, established by an articulating majority. The provision for an articulating majority, was suggested by the consideration, that political divisions of power were not subjected to any other tribunal. Loyalty was expected from these divisions of power by the majority which created them, in exercising and defending their respective trusts; and by providing a mode for supervising them, by a majority only both of the people and of the States, it disclosed

an intention that they should be supervised in no other mode. The specified supervising political tribunal would have been unnecessary, if the supreme court had been contemplated as such a tribunal. Suppose it had been proposed in the convention 'that, for the preservation of the Union, no political department, not representing a majority of the people of all the United States, should have a right to defend and maintain the powers allotted to it.' Would the adoption of this amendment have been wise or expedient? Yet its adoption would have been exactly equivalent to the chief argument, by which the right of defending themselves individually is denied to the States.

"This argument is enforced by the most exquisite derision of the States, of the people, and of human nature itself; the derision of contempt under an affectation of fear. It is gravely suggested that the Union is endangered by the ambition of the States. And what are the proofs of this tremendous ambition which meditates the destruction of the confederation? One State prohibits within its own territory an exclusive banking privilege, and another, the sale of lottery tickets. Is it not a broad grin at common sense to tell it, that such local State powers will destroy the Union? It was once asserted that the alien and sedition laws, like banking and lotteries, were necessary to preserve the Union. They are dead and the Union lives. Had the States resisted those laws successfully, by judicially liberating the persons unconstitutionally prosecuted under them, a great outcry would have been uttered by the consolidating party, that the Union was destroyed; yet it would have stood exactly where it now does. If the banking and lottery laws were also dead, might not the Union still live? Did either of these State resistances touch any of the Federal powers necessary to maintain the Union, or disclose the least symptom of ambition in any State to obtain any active power? The general interest was excited, though slowly, by the alien and sedition laws; because, though partially executed, they were of a general import, and produced a remedy, of which encroachments interesting only to one State are not susceptible. The laws were consigned to the

grave, and the party which made them dislodged from power. Was this destructive of the Union, or did it teach a consolidating faction, that it was safer to assail the States in detail, than by general attacks? Two observations of great force present themselves; one, that as the Federal government was designed to operate generally upon all the States for the sake of union, its partial operation upon one or a few, dismembers the intended combination and reinstates separate inimical interests; and is therefore radically unconstitutional, as defeating the very end and design of the Constitution; the other, that these frivolous charges of ambition, though egregiously magnified by all the arts of misrepresentation, only demonstrate that no such ambition exists, or that the States do not possess the means for gratifying it." *

"On the 29th of May, 1787, the convention was organized, and Mr. Randolph, of Virginia, offered sundry resolutions resuming the word national, though it had been rejected by all the states, and proposing 'that a *national* legislature shall have the right to legislate in all cases in which the harmony of the United States may be interrupted by the exercise of *individual* legislation, and to negative all laws passed by the several states, contravening, in the opinion of the national legislature, the articles of the union, or any treaty under the union.' The resolutions also proposed 'a *national* executive and a *national* judiciary; that the executive and a convenient number of the *national* judiciary ought to compose a *council of revision*, with authority to examine every act of the national legislature, before it shall operate, and every act of a *particular legislature*, before a negative thereon shall be final; and that the *dissent* of the said council shall amount to a *rejection*, unless the act of the national legislature be again passed, or that of a particular legislature be again negated by — of the members of each branch.'

"It is worthy of particular observation, that in this project, the constructive supremacy now claimed for the federal government '*over the articles of the union*,' was proposed to be

* John Taylor, of Caroline, "Tyranny Unmasked," pp. 314-325; Washington, 1822.

given to a national government; because the actual consideration of this identical power, and its absence from the constitution as it was finally adopted, seems to be irresistible evidence that it does not exist. Throughout Mr. Randolph's resolutions, fifteen in number, the word national is adopted, and the word Congress rejected, except in reference to the Congress under the confederation of 1777, proving that the word was applicable to a federal union, but not to a national government.

"The proposed national form of government was ultimately renounced or rejected, but the negative power over state laws with which it was invested, was much less objectionable than that now constructively contended for on behalf of the federal government. The president was to be one of a council of revision, and the influence of the states in his election might have afforded to them some feeble security, a little better than could be expected from a council of revision composed of a few federal judges. Both the legislative branches which were to pronounce the first veto upon state laws, were also to be exposed to popular influence, and might feel all the responsibility of which a body of men are susceptible in extending its own power by its own vote. A judicial veto, as now contended for, is exposed to no responsibility whatever. The council of revision, with the president at its head, were only to be controlled by more than a majority of the national legislature. This was evidently a better security for the small states, than a power in a majority of Congress to abrogate state laws. But all these alleviations of the power in a national form of government to negative state laws, were unsuccessful, because the principle itself, however modified, was inconsistent with the federal form adopted. It can never be conceived that the principle of a negative over state laws, audibly proposed and rejected, had silently crept into the constitution. This was quite consistent with the national form of government proposed, but quite inconsistent with the federal form adopted. The project for a national form of government was deduced from the doctrine, as we shall hereafter see, that the declaration of independence had committed the gross blunder of making the states dependent corporations; that it was in fact a

declaration of dependence. When this doctrine failed in the convention, the national negative over state laws died with it. Revived by construction, it assumes a far more formidable and consolidating aspect than as it was originally offered, because the usurped negative over state laws, by a majority of a court or of Congress, would not have its malignity to the states alleviated by the checks to which the project itself resorted. Without these checks, even the advocates for a national form of government thought such a negative intolerable. The project contemplated a mixed legislative, executive, and judicial supremacy over state laws, so that one department of this sovereignty, like that of the English, might check the other, in construing 'the articles of the union,' and did not venture even to propose, that a government should be established, in which a single court was to be invested with a supreme power over these articles, or the constitution. The idea seems to be a political monster never seen in fable or in fact.

"On the same day, Mr. C. Pinckney offered a draft for a federal 'constitution.' It recognised the people of the several states; proposed 'that the style of the government should be the *United States of America*; that the legislative power should be vested in a *Congress*, to be chosen by the people of the several states; enumerated limited powers to be exercised by this Congress; proposed a president of the United States; and that the legislature of the United States should have power to revise the laws of the several states that may be supposed to infringe the powers exclusively delegated to Congress, and to negative and annul such as do.'

"This project for a form of government being somewhat at enmity with the resolutions, hostilities between them forthwith commenced, and the resolutions obtained successive victories over a nominal rival, during the greater portion of the time expended by the convention. The journal, however, is too obscure to supply us with a history of a controversy which related only to the form of a national government mutually advocated. We do not find in the constitution the negative over state laws proposed both in the resolutions and the draft.

As it was distinctly proposed by both, it must have been maturely considered and doubly rejected. The reasons of these rejections were, that though a supreme power of construction, was consistent with, and might have been intrusted to a government throughout responsible to one people or nation, it was inconsistent with and could not therefore be intrusted to a federal form of government, or any of its departments. And hence when the federal form of government prevailed over the national form, the alteration of the federal articles was exclusively limited to the modes prescribed, and not extended to a supreme power of construction in the federal government or any of its departments. The constitution was not intended to be an alembick, fraught with heterogeneous principles, to condense the tortuosities of construction, and distil from taciturnity a supreme power of construction, and consequently a negative upon state legislation.

“May 30, Mr. Randolph, seconded by Mr. G. Morris, moved ‘that an union of states merely federal, will not accomplish the objects proposed by the articles of confederation, namely, common defence, security of liberty, and general welfare;’ and by Mr. Butler, seconded by Mr. Randolph, ‘that a *national* government ought to be established, consisting of a *supreme* legislative, judiciary, and executive.’ In opposition to this resolution it was moved, ‘that in order to carry into execution the design of the states in *forming this convention*, and to accomplish the objects proposed by the confederation, a more effective government, consisting of a legislative, judiciary, and executive, ought to be established,’ excluding the words *national* and *supreme*. But it was resolved ‘that a *national* government ought to be established, consisting of a *supreme* legislative, judiciary, and executive.’ The collision between these resolutions, and consequently the debate, was produced by the words *national* and *supreme*. Massachusetts, Pennsylvania, Delaware, Virginia, North-Carolina, and South-Carolina, voted for this resolution, Connecticut against it, and New-York was divided; so that a convention of only eight states decided by a majority of six, that the states should be annihilated. It was late in the session before twelve states as-

sembled; but whether an accession of votes, or the repentance usually attached to precipitancy, produced the ultimate discomfiture of the resolution to establish a supreme national government, can only be conjectured by computing the consequences likely to result from an excessive zeal for this consolidating policy, and from a refrigeration inculcated by an accession of votes or a firm opposition. . . .

"At the threshold of the business, we clearly discern that the convention was apprized of the meaning of words. One resolution asserts that a government merely *federal* would not answer, and that a *supreme national* government ought to be established. The rival resolution rejects the words national and supreme, as incompatible with a federal union. One avails itself of the intimation from Congress in favour of a national government, and rejects the intimations of the same Congress in favour of a federal government; the other prefers the latter intimations, because they were legitimated by the states, and rejects the former, because it was rejected by the states. These adverse opinions were evidently dictated, one by the political opinion already invented, of a consolidated nation; the other, by the actual existence of United States. The contrast between the two preliminary resolutions in a very important view, depends on a single word. One proposed 'a *supreme* legislative, judiciary, and executive,' the other 'a legislative, executive, and judiciary,' excluding the word supreme. This word was adopted as suitable for the proposed national government, and rejected, as inconsistent with the federal form of government, to which the states had confined their deputies. The adoption and rejection conspire to furnish us with a definition of this formidable word, both by the national and federal parties in the convention. The sense in which both of these parties understood it, caused its exclusion from the constitution, as inapplicable to a federal government. The advocates for a national government proposed to invest that form of government with a supreme power to 'construe the articles of the union.' The advocates for a federal government originally proposed to withhold supremacy from the legislative, judiciary, and executive, and though they at first failed, finally

succeeded. As applied by the successful federal party to the supreme court, it evidently refers to inferior federal courts. Instead of a judiciary, invested with a supreme power to construe the articles of the union and to negative state laws, a limited judiciary is found in the constitution. To reject a supreme legislature and executive, and yet to retain a supreme judiciary, was never even suggested by either the national or federal party in the convention. As the project for a national form of government, bestowed the supremacy of construing the articles of the union and negating state laws, upon all its departments, by plain words; and the project in favour of a federal form entirely rejected this supremacy, it is doing the utmost violence to probability to imagine, that the constitution by inference without plain words, and without its having been proposed in the convention, should have both deprived the federal legislature and executive of a power to settle the construction of our federal articles and to negative state laws, and also have bestowed this enormous power exclusively on one federal court.

“The word supreme is used twice in the constitution, once in reference to the superiority of the highest federal court over the inferior federal courts, and again in declaring ‘that the constitution, and laws made in pursuance thereof, shall be the supreme law of the land, and the judges in every state shall be bound thereby.’ Did it mean to create two supremacies, one in the court, and another in the constitution? Are they collateral, or is one superior to the other? Is the court supreme over the constitution, or the constitution supreme over the court? Are ‘the judges in every state’ to obey the *articles of the union*, or the construction of these articles by the supreme federal court?

“The project for a national government, gave a supremacy over the articles of the constitution it advocated, to the legislative, judiciary, and executive, and did not propose that the constitution should be supreme over these departments, because it would have involved a contradiction. As they were to have had a supreme power of construing its articles, these articles could not possess a supreme power over their construc-

tion. But a federal system required that the articles of union should be invested with supremacy, over the instruments created to obey and execute them. Hence they are declared to be so in reference to all these instruments, without excepting the federal court. And hence the right of altering these articles is retained by these parties. In all treaties, the right of construction must be attached to the right of alteration, or the latter right would be destroyed. No right of alteration was proposed to be reserved to the states by the project for a national government, nor any supremacy of the constitution recognised; and in lieu of such articles it was proposed to invest the government itself with a supremacy of construction; because, if a national government resulted from a consolidated people, collateral state and federal departments would not have existed mutually to enforce the supremacy of the constitution; and a national government must necessarily have possessed an absolute power of construing, under the sole control of the consolidated people, by election, in whom the right of alteration resided. But the right of alteration being placed in the states, because they made it, and not in a consolidated people, because such a people did not make it; the right of construction is attached to the altering power, and not given to its own agents under the fictions assumed to sustain a national government, namely, that a consolidated people existed; that this people possessed a right to make and alter a constitution for the union of states; and that a national government established by their authority, ought not therefore to be controlled by states in the construction of its articles.

"The supremacy of the constitution is an admonition to all departments, both state and federal, that they were bound to obey the restrictions it imposes. In relation to the federal government, it literally declares that its laws must conform to its exclusive and concurrent powers; and in relation to the state governments, it implies, that theirs must also conform to their exclusive and concurrent powers. It neither enlarges nor abridges the powers delegated or reserved. And it is enforced, not by an oath to be faithful to the supreme construc-

tions of the federal departments, but by an oath to be faithful to the supremacy of the constitution." *

"The facts stated by Mr. Martin are completely sustained by the journal of the convention, and far from being aggravated, are related in a softer tone than it would have justified; probably from a fear of exceeding the truth; as the vouchers necessary to refresh his memory, were locked up in the strong box of secrecy. It is evident from the journal, that the difference between a national and a federal government was earnestly debated, thoroughly considered, and well understood, in the convention. Both from the journal and Mr. Martin's assertion, it appears, that the identical two points of difference between these two forms of government, which comprise the question now in debate, were considered and determined. It was proposed to invest a *national Congress* with an unlimited negative over *all laws* of the states, contravening, in its opinion, the *articles of the union*. It was determined to confine the negative of a *federal Congress* to *specified cases*. It was proposed to extend the jurisdiction of a *national judiciary*, to questions which involve the *national peace and harmony*. It was determined to confine the jurisdiction of a *federal judiciary*, to *specified cases* also. Controversies between the federal and state departments would certainly arise, and might contravene the articles of the union, so as to involve the national peace and harmony. Propositions to invest a national legislature and a national judiciary with powers to settle such controversies, accorded with the plan of a national government, and must have been adopted had that plan succeeded. But when the federal plan was preferred, the attributes of the national plan were necessarily abandoned; and a federal balance was of course substituted for a national supremacy. The power proposed to be given over state rights to a national legislature and judiciary, could not be given to a federal legislature and judiciary, because it would have made them national. Therefore this supreme power was approved of in connexion with a national, and rejected in connexion with a federal form

* John Taylor, of Caroline, "New Views of the Constitution," Section III, Wash., 1836.

of government. The reason for the approbation was, that a national government could not exist without a supreme controlling power over the states; and the reason for its rejection was, that a federal government could not exist with it. A mutual controlling power between the federal and state departments, was as necessary for a federal, as an abolition of this principle was for a national, government.

"Mr. Hamilton's selection of one half of these attributes of a national form of government, and Mr. Madison's selection of the other, to be constructively reinstated in the constitution, produces a curious anomaly. The convention, so long as it contemplated a national government, determined that a concurrent power of preserving the articles of the union and its peace and harmony, ought to be lodged in a national legislature and judiciary. Mr. Hamilton gives this power to Congress exclusively. Mr. Madison gives it exclusively to the federal judiciary. Thus neither of these gentlemen adheres to the national system with which a supreme power was associated in the convention, nor to the federal system from which it was dissevered by the same body; but yet their two halves make up a whole national government, of which both approved. The plan for a national government, proposed to invest a national legislature with a negative power over state laws contravening 'the articles of the union or treaties,' and as a jurisdiction in the case of treaties was given by the constitution to the federal judiciary, but not in the case of contraventions to the articles of the union, a violent presumption arises, that the latter power, only contemplated for a national legislature, was never intended to be given to a federal judiciary. We do not discern in the journal of the convention, in the secret debates, or in the constitution, the most distant idea of placing the *articles of the union* exclusively under the guardianship of a judicial department, either when a national or federal government was contemplated; and such a proposition would not have obtained the least countenance, because it would not have accorded with either of the three forms, national, monarchical, or federal. Mr. Hamilton's construction is more consistent with the national system proposed, and the

federal system adopted, and also more republican, than Mr. Madison's, because a supremacy in Congress would be more national, as the house of representatives is elected by the people; more federal, as the senate is appointed by the state legislatures; and more republican, if that word embraces popular influence; than a supremacy in the judiciary, or a single court. A judiciary is associated with all governments, monarchical, aristocratical, or republican, and contains no innate principle for discriminating between those which are despotick, and those which are free. The nature of a government is defined by the structure of the legislative and executive departments. These contain the essential distinctions between free and despotick, a federal or a national, government, the departments most essential for effecting either object, must have been the means used, and not a department never contemplated as possessing any such capacity.

"The last paragraph extracted from Mr. Martin's statement, proposes a subject for public consideration, yet more important, as being more deeply connected with the preservation of a free, fair, and moderate form of government. If the parties he describes did exist, yet exist, and will for ever exist, it is evident that civil liberty can only be preserved by a constant attention to their movements, and a perpetual counteraction of their efforts. Monarchy, its hand-maid, consolidation, and its other hand-maid, ambition, all dressed in popular disguises, require the utmost watchfulness from those who do not love them, and prefer a republican government." *

"The terms of the guarantee in other views demolish the doctrines of a union between individuals constituting an American nation, and of recondite powers in the word constitution. 'The United States shall guarantee to *every state in this union.*' Thus it is positively asserted, that our union is a union of states, and not of individuals, and that it is a guarantee by states to states, and not of an American nation to states. The sovereignty of states is necessary, both to undertake and to require the fulfilment of the guarantee. Corporations could

* John Taylor, of Caroline, "New Views on the Constitution," pp. 43-45; 1823.

do neither. Had the attempt in the convention to establish a national government succeeded, the recognition contained in the mutual guarantee, that the union was a union of independent states, could not have been consistently introduced into the constitution.

"This guarantee ought to be considered in another very important light. Is the supreme court of the United States invested with a power of supervising and enforcing it? The question must be answered affirmatively, if this court can abridge or measure the rights of the states. A republican form of state government can only be constituted by rights. Are these rights guaranteed to the states by each other, or by the federal court? Had Mr. Madison and Mr. Hamilton adverted to this guarantee, when they were discussing the question, whether the court or Congress possessed the supremacy contended for, over the state governments, it would have furnished them with some lights towards its decision. As it is a guarantee by states to states, Mr. Madison must have proved that the court, and Mr. Hamilton that Congress, was the United States, to have invested either with a power of abridging (if a guarantee possesses this power), these republican rights. It seems to be a plain matter of fact, whether the court, or Congress, or the states themselves, are considered by the constitution as the guardian of state rights. It contains two positive stipulations for the preservation of state rights, or a republican form of government; their reservation, and a guarantee of this reservation. Neither Congress nor the federal judiciary is mentioned in either. Had the powers of either department embraced a right to regulate the division of power between the federal and state governments, this could not have happened. To counteract the ambition of usurpation, and the ingenuity of construction, the positive division of power is protected by the solemn compact of a mutual guarantee between the states themselves. This compact extends to all the rights, only to be secured by a republican form of government, and includes constructive alterations of the constitution, by which these rights may be abridged, without the concurrence of the parties to the guarantee. The federal judiciary does

not contract with each state to preserve its republican form of government; and if it obtains a power to regulate those rights by which this form is constituted, it may destroy the republican forms of state government, without violating an engagement. This consideration discloses the wide difference between the guarantee expressed, and the constructive guarantee usurped. The first does not comprise a power of taking from the states their republican rights; the other does. The federal court, by seizing upon the guarantee, and transforming it from a duty to preserve the republican rights of the states, into a power of abridging them, has claimed a supremacy over this compact, without being even a party to it. The supremacy claimed for Congress, is also extracted from the guarantee usurped by the court, by confounding the words United States and Congress, as of the same import. But the constitution plainly distinguishes between them." *

"Some state right to legislate independently of a federal veto, evidently results from the specification of cases to which this veto should extend; but according to precedents, there is no such right. The constitution declares that the consent of Congress shall only be necessary, to give validity to a few specified state laws, and that the republican forms of state governments shall be guaranteed by the states themselves. The precedents assert, that the dissent of the court may defeat any state laws, and that the court may control the republican rights of the states. These powers, exposed to no limitation, and capable of being perpetually increased by precedents, are not given to the federal government, and are deduced from constructions inconsistent both with the prohibitions and guarantee. . . . Congress, by extending the jurisdiction of the court, and the court by extending the legislative power of Congress, might rapidly effect a revolution, without the consent of the authority by which the constitution was established. It is impossible to believe that the states intended, by the limitations and prohibitions of the constitution, to invest the whole

* John Taylor, of Caroline, "Views on the Constitution," pp. 228, 229; Washington, 1823. *Vide* especially, *ibid.*, Section XII.

or any portion of the federal government, with an unlimited veto over their laws, or an exclusive guarantee of their republican forms of government; and we must either convict them of stupidity or gross inconsistencies, to find the constructive consolidated government, which the legislative and judicial federal supremacies contended for, would infallibly establish. These arguments apply to all other limitations and prohibitions of the constitution, as well as to those quoted. As to all we must admit that legislative and judicial power are correlatives, and that the latter cannot outrun its ally in the race for power; or that the constitution, whilst cautiously prescribing limits to the federal legislature, intended that the federal judiciary should be unrestrained. If the limitations imposed upon the federal legislature do not extend to the federal judiciary, the federal would cease to be a limited government, because one department may dissolve the restrictions imposed upon the other, against which its dependency and subordination would be no security. If the judicial veto does not stop where the legislative veto stops, the federal cannot be a limited government. Was the legislative federal veto limited, to bestow an unlimited veto upon the court, or to secure to the states some independent right of legislation? Was the guarantee intended to preserve republican governments, or to create a judicial sovereignty? These questions must be answered in one way by those who believe that the delegations, reservations, prohibitions, and guarantee, all imply a general principle; that this principle can be no other than state sovereignty and independence; and that all the attributes of this principle remain, except those expressly prohibited to the states. It is said that they have been surrendered to the finer principle, that judicial power is a political mint, which coins human nature without any alloy." *

"The constitution availed itself of pre-existing political sovereignties, and the powerful qualities of human nature, in creating a system of government to be enforced, not by the pen-

* John Taylor, of Caroline, "New Views on the Constitution," pp. 234-235; 1823.

alties of power, but by the sympathies of a common interest; and therefore it assigned federal powers to a federal sympathy, and local powers to a local sympathy. To find the line between them, we have only to consider upon which sympathy the measure proposed will operate. This substratum of the system is violated, either by using a federal sympathy to regulate state interests, or one local state sympathy to regulate federal interests. These sympathies, undisturbed, will move quietly along, like rivers, each in its own channel; and though they may be occasionally ruffled, no danger is to be apprehended so long as their channels are unobstructed. But as a river, stopped by a land slip, or the disruption of a mountain, becomes turbulent, and finally cuts out a new channel for itself, so if state sympathy is disturbed by the gradual encroachments of federal power, or overwhelmed by a national supremacy, it will become turbulent, and find a vent in some unforeseen direction.

"It is a fact that a national supremacy was proposed and rejected in the convention. An inference, that a refusal of supremacy to the whole government established, was a gift of it to a part; that a denial of it to elected representatives indicated an intention of bestowing it on a few men appointed by and responsible to the government from which it is withheld; contradicts this fact, because the states could not have intended partly to reserve, and entirely to destroy, their local sovereignties. If no supremacy is given by the line between state and federal powers, the line is found. The respective sympathies cannot be gotten at, nor any state or federal powers placed under their guardianship, unless an usurped supremacy is put out of their way. Their importance for preserving the union, might be demonstrated by a multitude of cases. Why did the Missouri question produce discontent? Because it violated state or local sympathies. Why have the bank and lottery laws (moralities of the same complexion, and exposed to the same construction), caused state opposition? Because they are trespasses upon state sympathies. And why are internal improvements by Congress unconstitutional? Because,

being of a local nature, they violate the division between local and federal interests, established by the constitution." *

"The union is admitted to be constituted of state and federal powers, but it is contended that the constitution has been inexplicit in dividing them. An apprehension of difficulty from this circumstance, caused the supremacy over the constitution to be deposited in three-fourths of the states, and not in a majority of Congress, nor in a majority of the supreme court. Even a majority of the states themselves was not intrusted with this power. But other precautions were necessary to prevent the state or federal department from altering the constitution by construction. Among these, the chief must be a principle applicable to both departments, or it could not have any effect. Neither can alter the constitution. What principle can enforce this truth, except that of a co-equal right of construction, and of self-preservation? If no department throughout our whole system can, by any unconstitutional act, legislative or judicial, deprive a citizen of a constitutional right, it would be strange if either the federal or state governments could be thus deprived of constitutional rights. Modes are resorted to for securing the rights of individuals. As to the rights of these departments, they are first secured by their co-equality. Neither or both can construe the constitution. Neither or both can alter it by construction. Neither or both can exercise the power of usurping a right belonging to the other. Neither or both can defend its own rights. The constitution gives no supremacy to either of these departments over the other. But the constitution, aware that this mutual right of self-defence against unconstitutional construction, might produce collisions, has provided a remedy to act in concert with the mutual check, as well devised for securing state and federal constitutional rights, as any which has ever been devised for securing the rights of individuals. If these departments should differ as to the extent of their respective rights, the remedy provided is not that one should exercise dominion over the other. On the contrary, the constitution

* John Taylor, of Caroline, "New Views on the Constitution," pp. 265-266; 1823.

contains a different, and probably the best remedy, which could have been devised, both to restrain and give effect to the salutary mutual check between the state and federal departments. Two-thirds of Congress may appeal from an erroneous state construction, and propose an amendment for controlling it, to the tribunal invested with the right of decision. Why was this right of appeal limited to two-thirds of Congress, if a majority was invested with a supreme power of construction, or if the same majority could appeal to the federal court? Can a majority evade this limitation, with or without the aid of its court? Two-thirds were required to prevent hasty and frivolous appeals, and to preserve the rights of the states against party majorities and geographical prepossessions. If two-thirds will not appeal against a state law, it is an admission of its constitutionality, by the constitutional mode established for deciding the question. If this specified mode is defeated by transferring the supremacy of construction from two-thirds of Congress and three-fourths of the states, to a majority of Congress and a majority of the court, one of these majorities would be invested with a power of deciding collisions between the state and federal governments, although neither is invested with a right even to propose an alteration of the powers given to either department by the constitution. The precision in the mode of amendment, is the remedy provided against any want of precision, in the division of powers, which the licentiousness of construction might lay hold of. The security against unconstitutional or inconvenient state acts, is deposited in two-thirds of Congress and three-fourths of the states, as a provision for settling collisions between the state and federal governments amicably, and for avoiding the more dangerous conflicts which a supremacy of geographical majorities would produce, if invested with a supremacy liable to geographical fluctuations. In this provision the constitution discloses an eminent superiority over every other division of power which has hitherto been invented. The mutuality of the check alone can settle collisions between the English political departments; here, the constitution has established a mode by which either the federal or

state governments can refer their settlement to a regular tribunal, so as to obviate any inconvenience arising from a division of power, and also to preserve the mutual check between collateral political departments. The difference between the two resources is disclosed by the consideration, that our tribunal for settling such collisions, is deeply interested to preserve a free form of government, and that each English department is deeply influenced to get as much power as it can from its rivals. Is there no difference between an appeal by two-thirds of Congress to the tribunal invested exclusively with the power of altering the constitution, in order to settle any difficulties as to the extent of reserved or delegated powers, and an appeal by a majority of Congress to a majority of the supreme court for the same purpose? Suppose one English department could settle its own collisions with the others. It would reduce that government to the form now proposed for us, by expunging from the constitution both its provision for settling such collisions, and also the mutual check between independent political departments. The state and federal departments are essential portions of our form of government. These were intended to be preserved by their mutual independence, and by the special remedy to meet collisions, which we have just considered, and not by a supremacy in one department over the other. That would establish a concentrated sovereignty in the federal government, as absolute as a supremacy of the king of England over the lords and commons. If the constitution had invested the federal department with this supremacy, it would not have provided a mode for deciding collisions, because these could not have arisen between supremacy and subordination; but this mode was suggested by a foresight, that collisions would be produced by the counterpoise and mutual check, without which its division of powers would be nominal and ineffectual."*

"The second article of the constitution, by explicitly asserting the federal character of the house of representatives, definitively excludes a national character from the federal

* John Taylor, of Caroline, "New Views on the Constitution," pp. 255-257; 1823.

government, and abolishes entirely a place of residence for the supreme authority, by which the reserved powers of the states are assailed. 'In choosing the president, the votes shall be taken by *states, the representatives of each state* having one.' Was the constitution mistaken in expounding itself; and is Mr. Madison's construction, which has been made the basis of consolidating inferences, 'that this house is a national representation,' more correct than the constitution in calling it a representation of states? It describes all its branches as federal. The house of representatives is repeatedly recognised by the mode of its formation, and positively in this quotation, as a representation of states. The senate is allowed to be so. And the president is either to be chosen by electors to be appointed as the states shall direct, or by the representatives of these states in Congress. Thus the federal character of the union seems to have been as plainly established, and the proposed national character as plainly rejected, as could have been effected by words. But how seldom can words remove prepossessions. A 'judicial power of the *United States*,' though thus also recognised as federal, is considered as national, as able to assume or to receive from Congress a new species of national supremacy, and as invested with a power to impair or destroy the federal character, repeatedly avowed by the constitution itself." *

". . . It is questionable, therefore, whether it was the intention of the general, or any state government, to erect judicial power into a political department, by inferences to be ingeniously drawn from the ideas of its independence, and the dependence of legislatures upon constitutions. The lines of power to mould laws and constitutions without responsibility, into the endless forms within the reach of construction, would have been distinctly expressed, and not left to be traced from a single word of hieroglyphical obscurity.

"But judicial power has seized upon a quality peculiar to the American policy, to transform itself into a political department, and to extend its claims far beyond precedent. All

* John Taylor, of Caroline, "New Views on the Constitution," pp. 277, 278; 1823.

our governments are limited agencies; others are universally or generally unlimited sovereignties. Legislation, under our policy, is subject to constitutional restrictions; according to the policy of other nations, it is the expression of the sovereign's will. In one case, legislation, which exceeds its agency or violates constitutional limits, is void; in the other, such an excess cannot happen. Being void, no publick functionary or private citizen ought to execute it; therefore judges, jurymen or officers of any other description, are bound to determine whether the instrument exhibited to them as law, be law. But all these descriptions of persons are bound by the laws of sovereign governments, and have no power, direct or indirect, to determine upon the validity of a law. None of them, therefore, can become a political department. Whereas, if the judges of the United States can acquire the exclusive right of declaring a law void, without any responsibility or mode of defeating the declaration, they must become a political department of great importance. An intention of creating judicial power into a political department, as a barrier against legislative usurpation, is the inference drawn by itself, from its right to refuse to execute unconstitutional laws; but this right belongs to juries, to officers, and to every citizen. It flows from the limited nature of our governments, contrived, not to increase the power of judges or juries, but to secure the sovereignty of the people. This would not be secured, by inferring from the limitation of legislative power elected by the people, an unlimited judicial power not elected by the people. To distrust and limit responsible and removable agents, and trust without limit irresponsible and immoveable, could never have been intended." *

"The representation in the house of commons had not prevented the bad effects of a concentrated supremacy. The geography of the United States rendered it impossible that a Congress should be as well qualified to exercise a national supremacy as the English parliament; and our heterogeneous local interests could not be governed by a concentrated power,

* John Taylor, "Inquiry into the Principles and Policy of the Government of the United States," pp. 207-208; 1814.

except by melting them up together in the crucible of despotism. Such a project, with only half our present extent of territory, was but little less chimerical, than one for coercing a whole continent into a consolidated government, from an expectation that geographical lines could be obliterated by representation. It was even then foreseen that a Congress would have its geography and climates, like the surface of the United States. To avoid a concentrated supremacy, and also geographical collisions in or out of Congress, the expedient of conforming to the laws of nature, was preferred to a war with them. The division of local and federal interests united each allotment of powers with the strongest natural motive for their preservation. It was the interest of each state to manage its local affairs in its own way, and it was the interest of all the states to manage their common affairs by a mutual concert. Thus both interests were made to harmonise with both objects; they were not violated in either case; and a common interest was used as the cement both of local and federal powers.

“To suppose that the state governments, operating within limited territorial lines, either would or could defeat our federal prosperity, and yet that a national government, operating without any limitation, would not or could not commit local partialities, is in theory a contradiction. A common federal interest prevents a state from attempting the first mischief; all the allurements of supreme power, would invite a national government to commit the second. That these can get into a federal Congress, has been practically proved, upon occasions both important and frivolous. Ought they to be multiplied by changing a federal into a national Congress? The geographical question about unsettled lands, was so managed as to get them from some states and leave them to others. The funding and banking questions were decided by geographical motives. The sedition law was intended to operate geographically. The controversy for the presidency discloses geographical feelings, both in Congress and the states. The Missouri question displayed a more formidable geographical spirit in Congress, than has ever appeared in a state govern-

ment. The usurped supremacy over a federal treasury, has cost the people many millions. These and other facts prove, that a national supremacy would be only a perpetual lottery for distributing blanks and prizes to states and individuals, by the will of a geographical majority; and that excessive corruption and the keenest resentment would probably be produced by these geographical benefits and injuries. The result of the practical testimony is, that local interests, if left at home, will never hurt the federal union; but that, if assembled in Congress, they will produce a government influenced by fraud, which must end in tyranny, or destroy the union. An exercise of local powers by Congress and the supreme court, has already interrupted our federal harmony; and it is obvious, that the division of powers between the state and federal governments, must have been the true source of that share of prosperity which we have hitherto enjoyed.

"The expedient for counteracting the evils likely to ensue from the dissimilarity between geographical interests, was to leave the lines between the states, and the local interests which these lines embraced, undisturbed, instead of collecting them into one intriguing arena. The more numerous are state governments, the less able will one be to usurp federal powers. Each will be controlled by the others in such attempts. But if a supreme power over state local rights should be concentrated in Congress, an injudicious or fraudulent exercise of it would be the consequence, and provoke pernicious geographical combinations. Congress would become an assembly of geographical envoys, perpetually exposed to the same difficulties which made it so hard for the state deputies to frame a federal constitution. If a large state was divided into two counties, a legislature composed of representatives from each, would exhibit a scene of geographical contentions. A concentrated supremacy in Congress would substantially divide the United States into three great counties, northern, southern, and western; and their representatives would be influenced by geographical circumstances and habits, ten-fold stronger than those which would produce pernicious collisions between the two supposed dividends of one state. There existed no rem-

edy against an evil so certain, but to divest a majority of Congress of a power to exercise local partialities.

“The force of this argument depends upon the fact, whether the name, Congress, can wring out of human nature its acknowledged qualities. But is not human nature liable to a geographical mensuration? If it received impressions from locality, its geography may be almost as distinctly ascertained, as that of the earth. The geography of human nature sticks to a man like his skin, or travels with him like his shadow. Will he be flayed of this adhesive integument, by calling him a member of Congress? The sages who have formed and improved our system of government, sensible that the man and his geography could never be separated, have used this quality of human nature so as to make it a friend, and not an enemy to the union. They saw its efficacy to unite the provinces against England, and wisely inferred that it would also unite the states in reference to other countries, and they availed themselves of the geography of the mind, both to effect the union, and also to prevent a disunion. They did not depend upon its force in one case, and go to war with it in another, but they conformed to it in both, by using it as the instrument for securing the states against foreign nations, and also as the instrument for expelling the evils which would be produced by a concentrated power at home.

“To prevent local interests from going to war with each other, they are incarcerated within the lines of a state, and if they should be let loose through the avenue of Congress, and the postern of the supreme court, the soundest security for the union of the states and the liberty of the people, will be lost. Local interests, instead of being confined within the boundary of each state, will go to war with each other in Congress, the causes of their hostility, intended to be removed by the union, will be revived, victories will be gained and defeats suffered, and both will generate new battles. Repulsion and attraction, arising from the difference and similitude of geographical interests, would create combinations to commit local injuries or obtain local advantages by the laws of Congress; conflicts between states, intended to be prevented, would be ex-

cited, and multiplied; and a national supremacy over state rights would either produce a mass of fragments as materials for some new form of government, or require the almighty power of despotism to enforce its fraudulent awards. Against this host of evils, the constitution provides, by using the geographical interest of the United States to unite them against the geographical interest of other countries, and by leaving the internal geographical interest of each state undisturbed, that it may not destroy our internal tranquillity." *

The opinions of Mr. Madison, in so far as they regard the Virginia and Kentucky Resolutions, cannot be considered apart from those of Mr. Taylor and Mr. Jefferson, who with him, were responsible for those Resolutions. Mr. Taylor's views regarding the Court have just been stated. Mr. Jefferson's opinions as to its constitutional place are equally positive; and there can be no question as to their being absolutely opposed to the view here taken by Mr. Madison.

In his draft of the Kentucky Resolutions, Mr. Jefferson writes:

"1. Resolved, That the several states composing the United States of America are not united on the principle of unlimited submission to their general government; but that, by compact, under the style and title of a Constitution for the United States, and of amendments thereto, they constituted a general government for special purposes, delegated to that government certain definite powers, reserving, each state to itself, the residuary mass of right to their own self-government; and that whensoever the general government assumes undelegated powers, its acts are unauthorized, void, and of no force; that to this compact each state acceded as a state, and is an integral party; *that this government, created by this compact, was not made the exclusive or final judge of the extent of the powers delegated to itself, since that would have made its discretion, and not the Constitution, the measure of its powers; but that, as in all other cases of compact among parties having no com-*

* John Taylor, of Caroline, "New Views on the Constitution," pp. 260-263; 1823.

mon judge, each party has an equal right to judge for itself, as well of infractions as of the mode and measure of redress."

Whatever Mr. Madison may have intended by the Virginia Resolutions, in regard to the Supreme Court's claim to jurisdiction over State constructions, there can be no reasonable shadow of doubt as to Mr. Jefferson's meaning in the Kentucky Resolutions. Could one suppose this explicit statement to be "unguarded" it is commented in his always inimical comment upon Justice Marshall's claims; *e. g.*

"I had read in the *Enquirer*, and with great approbation, the pieces signed Hampden, and have read them again with redoubled approbation, in the copies you have been so kind as to send me. I subscribe to every tittle of them. They contain the true principles of the revolution of 1800, for that was as real a revolution in the principles of our government as that of 1776 was in its form; not effected indeed by the sword, as that, but by the rational and peaceable instrument of reform, the suffrage of the people. The nation declared its will by dismissing functionaries of one principle, and electing those of another, in the two branches, executive and legislative, submitted to their election. Over the judiciary department, the constitution had deprived them of their control. That, therefore, has continued the reprobated system, and although new matter has been occasionally incorporated into the old, yet the leaven of the old mass seems to assimilate to itself the new, and after twenty years' confirmation of the federated system by the voice of the nation, declared through the medium of elections, we find the judiciary on every occasion, still driving us into consolidation.

"In denying the right they usurp of exclusively explaining the constitution, I go further than you do, if I understand rightly your quotation from the *Federalist*, of an opinion that 'the judiciary is the last resort in relation to the other departments of the government, but not in relation to the rights of the parties to the compact under which the judiciary is derived.' If this opinion be sound, then indeed is our constitution a complete *felo de se*. . . . The constitution, on this hy-

pothesis, is a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please. It should be remembered, as an axiom of eternal truth in politics, that whatever power in any government is independent, is absolute also; in theory only, at first, while the spirit of the people is up, but in practice, as fast as that relaxes. Independence can be trusted nowhere but with the people in mass. They are inherently independent of all but moral law." Jefferson's letter to Judge Roane, Sept. 6, 1819. (N. B. Whom Mr. Jefferson meant by "the people" seems to be answered in his letter of June 12, 1823, to Judge Johnson where he says: "I have been blamed for saying, that a prevalence of the doctrines of consolidation would one day call for reformation or *revolution*. I answer by asking if a single State of the Union would have agreed to the constitution, had it given all powers to the General Government? If the whole opposition to it did not proceed from the jealousy and fear of every State, of being subjected to the other States in matters merely its own? And if there is any reason to believe the States more disposed now than then, to acquiesce in this general surrender of all their rights and powers to a consolidated government, one and undivided?") He then continues: "You request me confidentially, to examine the question, whether the Supreme Court has advanced beyond its constitutional limits, and trespassed on those of the State authorities? I do not undertake it, my dear Sir, because I am unable. Age and the wane of mind consequent on it, have disqualified me from investigations so severe, and researches so laborious. And it is the less necessary in this case, as having been already done by others with a logic and learning to which I could add nothing. On the decision of the case of *Cohens vs. The State of Virginia*, in the Supreme Court of the United States, in March, 1821, Judge Roane, under the signature of Algernon Sidney, wrote for the *Enquirer* a series of papers on the law of that case. I considered these papers maturely as they came out, and confess that they appeared to me to pulverize every word which had been delivered by Judge Marshall, of the extra-judicial part of his opinion; and all was extra-judi-

cial, except the decision that the act of Congress had not purported to give to the corporation of Washington the authority claimed by their lottery law, of controlling the laws of the States within the States themselves. But unable to claim that case, he could not let it go entirely, but went on gratuitously to prove, that notwithstanding the eleventh amendment of the constitution, a State *could* be brought as a defendant, to the bar of his court;^{31G1} and again, that Congress might authorize a corporation of its territory to exercise legislation within a State, and paramount to the laws of that State. I cite the sum and result only of his doctrines, according to the impression made on my mind at the time, and still remaining. If not strictly accurate in circumstance, it is so in substance. This doctrine was so completely refuted by Roane, that if he can be answered, I surrender human reason as a vain and useless faculty, given to bewilder, and not to guide us. And I mention this particular case as one only of several, because it gave occasion to that thorough examination of the constitutional limits between the General and State jurisdictions, which you have asked for. There were two other writers in the same paper, under the signatures of Fletcher of Saltoun, and Somers, who, in a few essays, presented some very luminous and striking views of the question. And there was a particular paper which recapitulated all the cases in which it was thought the federal court had usurped on the State jurisdictions. . . .

"It may be impracticable to lay down any general formula of words which shall decide at once, and with precision, in every case, this limit of jurisdiction. But there are two canons which will guide us safely in most of the cases. 1st, The capital and leading object of the constitution was to leave with the States all authorities which respected their own citizens only, and to transfer to the United States those which respected citizens of foreign or other States: to make us several as to ourselves, but one as to all others. In the latter case, then, constructions should lean to the general jurisdiction, if the words will bear it; and in favor of the States in the former, if possible to be so construed. And indeed, between citi-

zens and citizens of the same State, and under their own laws, I know but a single case in which a jurisdiction is given to the General Government. That is, where anything but gold or silver is made a lawful tender, or the obligation of contracts is any otherwise impaired. The separate legislatures had so often abused that power, that the citizens themselves chose to trust it to the general, rather than to their own special authorities. 2d. On every question of construction, carry ourselves back to the time when the constitution was adopted, recollect the spirit manifested in the debates, and instead of trying what meaning may be squeezed out of the text, or invented against it, conform to the probable one in which it was passed. Let us try Cohen's case by these canons only, referring always, however, for full argument, to the essays before cited. . . .

"But the Chief Justice says, 'there must be an ultimate arbiter somewhere.' True, there must; but does that prove it is either party? The ultimate arbiter is the people of the Union, assembled by their deputies in convention, at the call of Congress, or of two-thirds of the States. Let them decide to which they mean to give an authority claimed by two of their organs." *

Mr. Jefferson lost few opportunities to manifest his distrust of what he thought the usurped power of the Supreme Court. In his letter of September 28, 1820, to Mr. Jarvis, he says:

"You seem, in pages 84 and 148, to consider the judges as the ultimate arbiters of all constitutional questions; a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy. Our judges are as honest as other men, and not more so. They have, with others, the same passions for party, for power, and the privilege of their corps. Their maxim is '*boni judicis est ampliare jurisdictionem*,' and their power the more dangerous as they are in office for life, and not responsible, as the other functionaries are, to the elective control. The constitution has erected no

* Letter to Judge Johnson, June 12, 1823, "Works," Vol. VII, pp. 293-298.

such single tribunal, knowing that to whatever hands confided, with the corruptions of time and party, its members would become despots. . . . The judges certainly have more frequent occasion to act on constitutional questions, because the laws of *meum* and *tuum* and of criminal action, forming the great mass of the system of law, constitute their particular department. When the legislative or executive functionaries act unconstitutionally, they are responsible to the people in their elective capacity. The exemption of the judges from that is quite dangerous enough. I know no safe depository of the ultimate powers of the society but the people themselves." *

In a letter of January 19, 1821 to Archibald Thweat, he writes:

"I am sensible of the inroads daily making by the federal, into the jurisdiction of its co-ordinate associates, the State governments. The legislative and executive branches may sometimes err, but elections and dependence will bring them to rights. The judiciary branch is the instrument which, working like gravity, without intermission, is to press us at last into one consolidated mass." †

"It has long, however, been my opinion, and I have never shrunk from its expression, (although I do not choose to put it into a newspaper, nor, like a Priam in armor, offer myself its champion,) that the germ of dissolution of our federal government is in the constitution of the federal judiciary; an irresponsible body, (for impeachment is scarcely a scarecrow,) working like gravity by night and by day, gaining a little to-day and a little to-morrow, and advancing its noiseless step like a thief, over the field of jurisdiction, until all shall be usurped from the States, and the government of all be consolidated into one. To this I am opposed; because, when all government, domestic and foreign, in little as in great things, shall be drawn to Washington as the centre of all power, it will render powerless the checks provided of one

* "Works," Vol. VII, pp. 178-179.

† *Ibid.*, p. 199.

government on another, and will become as venal and oppressive as the government from which we separated. It will be as in Europe, where every man must be either pike or gudgeon, hammer or anvil. Our functionaries and theirs are wares from the same work-shop; made of the same materials, and by the same hand. If the States look with apathy on this silent descent of their government into the gulf which is to swallow all, we have only to weep over the human character formed uncontrollable but by a rod of iron, and the blasphemers of man, as incapable of self-government, become his true historians." *

"I cannot lay down my pen without recurring to one of the subjects of my former letter, for in truth there is no danger I apprehend so much as the consolidation of our government by the noiseless, and therefore unalarming, instrumentality of the supreme court. This is the form in which federalism now arrays itself, and consolidation is the present principle of distinction between republicans and the pseudo-republicans but real federalists." †

"One single object, if your provision attains it, will entitle you to the endless gratitude of society; that of restraining judges from usurping legislation. And with no body of men is this restraint more wanting than with the judges of what is commonly called our general government, but what I call our foreign department. They are practising on the constitution by inferences, analogies, and sophisms, as they would on an ordinary law. They do not seem aware that it is not even a *constitution*, formed by a single authority, and subject to a single superintendence and control; but that it is a compact of many independent powers, every single one of which claims an equal right to understand it, and to require its observance. However strong the cord of compact may be, there is a point of tension at which it will break. A few such doctrinal decisions, as barefaced as that of the Cohens, happening to bear immediately on two or three of the large

* Jefferson's letter to Mr. C. Hammond, August 18, 1821, "Works," Vol. VII, p. 216.

† Letter to Judge Johnson, March 4, 1823, "Works," Vol. VII, p. 278.

States, may induce them to join in arresting the march of government, and in arousing the co-States to pay some attention to what is passing, to bring back the compact to its original principles, or to modify it legitimately by the express consent of the parties themselves, and not by the usurpation of their created agents. They imagine they can lead us into a consolidated government, while their road leads directly to its dissolution. This member of the government was at first considered as the most harmless and helpless of all its organs. But it has proved that the power of declaring what the law is, *ad libitum*, by sapping and mining, sily, and without alarm, the foundations of the constitution, can do what open force would not dare to attempt.” *

“It is not enough that honest men are appointed Judges. All know the influence of interest on the mind of man, and how unconsciously his judgment is warped by that influence. To this bias add that of the *esprit de corps*, of their peculiar maxim and creed, that ‘it is the office of a good Judge to enlarge his jurisdiction,’ and the absence of responsibility; and how can we expect impartial decision between the General government, of which they are themselves so eminent a part, and an individual State, from which they have nothing to hope or fear? We have seen, too, that contrary to all correct example, they are in the habit of going out of the question before them, to throw an anchor ahead, and grapple further hold for future advances of power. They are then, in fact, the corps of sappers and miners, steadily working to undermine the independent rights of the States, and to consolidate all power in the hands of that government in which they have so important a freehold estate. But it is not by the consolidation, or concentration of powers, but by their distribution, that good government is effected. Were not this great country already divided into States, that division must be made, that each might do for itself what concerns itself directly, and what it can so much better do than a distant authority. Every State again is divided into counties, each to take care of what

* Letter to Edward Livingston, March 25, 1825, “Works,” Vol. VII, pp. 403-404.
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lies within its local bounds; each county again into townships or wards, to manage minuter details; and every ward into farms, to be governed each by its individual proprietor. Were we directed from Washington when to sow, and when to reap, we should soon want bread. It is by this partition of cares, descending in gradation from general to particular, that the mass of human affairs may be best managed, for the good and prosperity of all. I repeat, that I do not charge the Judges with wilful and ill-intentioned error; but honest error must be arrested, where its toleration leads to public ruin." *

In the earlier times of the United States, while the intention of the Constitution was still a matter not merely of study but of memory, with those who had created it, this pretension of the Supreme Court was frequently protested and nullified by the States; *e. g.*:

"That the subject referred to them, has not failed to engage their most serious reflection. They have viewed it in every point of light in which it could be considered. It is by no means a matter of indifference. In whatever way the legislature may decide, it will be in the highest degree important. We may purchase peace by a surrender of right, or exhibit to the present times, and to late posterity, an awful lesson in the conflicts to preserve it. It becomes a sacred duty we owe to our common country, to discard pusillanimity on the one hand, and rashness on the other. In either case we shall furnish materials for history; and future times must judge of our wisdom, or our weakness. Ancient history furnishes no parallel to the Constitution of this United Republic. And should this great experiment fail, vain may be every effort to establish rational liberty. The spirit of the times gives birth to jealousy of powers; it is interwoven in our system, and is, perhaps, essential to perfect freedom and the rights of mankind. But this jealousy urged to the extreme, may eventually destroy even liberty itself. As connected with the Federal system, the State Governments, with their inherent rights, must, at every hazard, be preserved entire; other-

* Autobiography, Jefferson's "Works," Vol. I, pp. 81-82.

wise the General Government may assume a character, never contemplated by its framers, which may change its whole nature. . . .

"But it had no effect upon Pennsylvania, tenacious of her own rights resting upon her own laws, and understanding, as well as any other State, the extent of the powers of Congress, and the authority she had consented to vest in that body. Committees were appointed to confer with a Committee of Congress, but every conference was ineffectual; and on the 31st January, 1780, by an unanimous voice of the General Assembly, the following decisive instructions were transmitted to the Pennsylvania delegation in Congress:

"It is the proper business, and the strict right of juries to establish facts; yet the Court of Appeals took upon them to violate this essential part of jury-trial and to reduce in effect this mode of jurisprudence to the course of the civil law; a proceeding to which the State of Pennsylvania cannot yield.

"Although the Committee, in common with every member of the House reverence the Constitution of the United States, and its lawful authorities, yet there is a respect due to the solemn and public acts, and to the honor and dignity of our own State, and the unvarying assertion of her right for a period of thirty years. Your Committee therefore offer the following resolutions:

"Resolved by the Senate and House of Representatives of the Commonwealth of Pennsylvania &c. That as a member of the Federal Union, the Legislature of Pennsylvania acknowledges the supremacy, and will cheerfully submit to the authority, of the General Government, as far as that authority is delegated by the Constitution of the United States. But, whilst they yield to this authority, when exercised within Constitutional limits, they trust they will not be considered as acting hostile to the General Government, when as guardians of State rights, they cannot permit an infringement of those rights, by an unconstitutional exercise of power in the United States Courts.

"Resolved, That in a Government like that of the United

States, where there are powers granted to the General Government, and rights reserved to the States, it is impossible, from the imperfection of language, so to define the limits of each, that difficulties should not sometimes arise from a collision of powers; and it is to be lamented that no provision is made in the Constitution, for determining disputes between the General and State Governments, by an impartial tribunal, when such cases occur.

"Resolved, That from the construction the United States Courts give to their powers, the harmony of the States, if they resist encroachments on their rights, will frequently be interrupted; and if to prevent this evil, they should, on all occasions, yield to stretches of power, the reserved rights of the States will depend on the arbitrary power of the Courts.

"Resolved, That, should the independence of the States, as secured by the Constitution, be destroyed, the liberties of the people, in so extensive a country, cannot long survive. To suffer the United States Courts to decide on State rights, will, from a bias in favor of power, necessarily destroy the Federal part of our Government; and whenever the Government of the United States becomes consolidated, we may learn, from the history of nations, what will be the event."

"The people of the United States by the adoption of the federal constitution established a general government for special purposes, reserving to themselves respectively, the rights and authorities not delegated in that instrument. To the compact thereby created, each state acceded in its character as a state, and is a party. The act of union thus entered into being to all intents and purposes a treaty between sovereign states, the general government by this treaty was not constituted the exclusive or final judge of the powers it was to exercise; for if it were so to judge then its judgment and not the constitution would be the measure of its authority." *

"The committee are aware of the doctrine, that the Federal Courts are exclusively vested with jurisdiction to declare, in the last resort, the true interpretation of the Constitution of

* Resolution of Pennsylvania against the Bank, Jan. 11, 1811.

the United States. To this doctrine, in the latitude contended for, they can never give their assent. . . .

"By an express provision of the Constitution of the United States, a provision introduced purposely to effect that object, the States, in any controversies they may have with individuals, are placed beyond the jurisdiction of the Federal Courts. It would seem incontrovertible that the amendatory article placed the States and the United States in a relation to each other different from that in which they stood under the original Constitution. Different in this, that in all cases where the States could not be called to answer in the Federal Courts, these courts ceased to be a constitutional tribunal to investigate and determine their power and authority under the Constitution of the United States. The duty of the courts to declare the law terminated with their authority to execute it.

"The committee conceive that such is the true, and that such is the settled construction of the Constitution; settled by an authority paramount to all others, and from which there can be no appeal, the authority of [the people] themselves.

"So early as the year 1798 the States and the people were called to declare their opinions upon the question involving the relative rights and powers of the government of the United States. . . .

"In the Virginia legislature these answers (of the State to the Virginia Resolution) were submitted to a committee of which Mr. Madison was chairman, and in January, 1800, this committee made a report, which has ever since been considered the true text-book of republican principles. In that report the claim that the federal judiciary is the exclusive expositor of the federal constitution is taken up and examined. . . .

"The resolution of Kentucky and Virginia, and of Massachusetts (and others) in reply, and the answers to these replies by the Legislature of Virginia, were a direct and constitutional appeal to the States and the people upon the great question at issue. The appeal was decided by the presidential and other elections of 1800. The States and the people recognized and affirmed the doctrines of Kentucky and Virginia,

by effecting a total change in the administration of the federal government . . . Thus has the question whether the Federal Courts are the sole expositors of the Constitution of the United States in the last resort, or whether the States 'as in all other cases of compact among parties having no common Judge' have an equal right to interpret that Constitution for themselves, where their sovereign rights are involved, been decided against the profession of the federal Judge, by the people themselves . . .

" . . . These two cases are evidence that in great questions of political rights and political powers a decision of the Supreme Court of the United States is not conclusive of the rights decided by it; if the United States stand justified in withholding a commission when the Court adjudged it to be the party's right; if the United States might, without reprehension, retain possession of the Yazoo lands after the Supreme Court decided that they were the property of the purchasers from Georgia, surely the State of Ohio ought not to be condemned because she did not abandon her solemn legislative acts as a dead letter upon the promulgation of an opinion of that tribunal."

"Since the exemptions claimed by the Bank are sustained upon the proposition that the power that created it must have the power to preserve it, there would seem to be a strict propriety in putting the creating power to the exercise of this preserving power, and thus ascertaining distinctly whether the executive and the legislative departments of the government of the Union will recognize, sustain and enforce the doctrine of the judicial department.

"For this purpose the committee recommend that provisions be made by law, forbidding the Keepers of our jails from receiving into their custody any person committed at the suit of the Bank of the United States," etc.

"Resolved, by the Great Assembly of the State of Ohio, That in respect to the powers of the governments of the several States that comprise the American Union and the powers of the federal government, this General Assembly do recognize and approve the doctrine asserted by the Legislatures

of Kentucky and Virginia in their resolution of . . . 1798 and January 1800," etc.*

"And whereas, the right to punish crime . . . is an original and a necessary part of sovereignty which the State of Georgia has never parted with,

"Be it therefore resolved . . . That they view with feelings of the deepest regret the interference by the Chief Justice of the Supreme Court of the United States, in the administration of the criminal laws of this State, and that such an interference is a flagrant violation of her rights . . .

"Resolved further, That . . . every officer of this State is hereby . . . enjoined, to disregard any and every mandate and process that has been, or shall be served upon them . . . for the purpose of arresting the execution of any of the criminal laws of this State.

"Resolved, That the State of Georgia, will never so far compromise her sovereignty as an independent State, as to become a party to the case sought to be made before the Supreme Court of the United States, by the writ in question." Resolution of Georgia Legislature relative to the case of George Tassels, Dec. 22, 1830.^{31G2}

"According to my limited conception, the Supreme Court is not made by the Constitution of the United States, the arbiter in controversies involving rights of sovereignty between the States and the United States." †

"When the general government encroaches upon the rights of the State, is it a safe principle to admit that a portion of the encroaching power shall have the right to determine finally whether an encroachment has been made or not? In fact, most of the encroachments made by the general government flow through the Supreme Court itself, the very tribunal which claims to be the final arbiter of all such disputes. What chance for justice have the States when the usurpers of their rights are made their Judges? Just as much as individuals when judged by their oppressors. It is therefore believed to be the

* Report of Ohio relating to the Bank and the powers of the Federal Judiciary, January 3, 1821.

† Letter of Governor of Georgia, Feb. 21, 1827.

right as it may hereafter become the duty of the State governments, to protect themselves from encroachments, and their citizens from oppression, by refusing obedience to the unconstitutional mandates of the federal judges." Message of Governor of Kentucky, November 7, 1825.

"All other powers remain in the individual States, comprehending the interior and other concerns. These combined form one complete Government. Should there be any defect in this form of Government—or any collision occur—it cannot be remedied by the sole Act of Congress, or of a State. The people must be resorted to for enlargement or modification. If a State should differ with the United States about the construction of them, there is no common umpire but the people, who should make amendments in the constitutional way, or suffer from the defect. In such a case, the Constitution of the United States is federal. IT IS A LEAGUE OR TREATY made by the INDIVIDUAL STATES, as one party, and ALL THE STATES, as another party. When two nations differ about the meaning of any clause, sentence, or word in a Treaty, neither has an exclusive right to decide; they endeavour to adjust the matter by negotiation, but if it cannot be thus accomplished, each has a right to retain its own interpretation, until a reference be had to the mediation of other Nations, an Arbitration, or the fate of war. There is no provision in the Constitution, that in such a case the Judges of the Supreme Court of the United States shall control and be conclusive—neither can the Congress by a law confer that power. There appears to be a defect in this matter. It is a *casus omissus*, which ought in some way to be remedied. Perhaps the Vice President and Senate of the United States—or Commissioners appointed, say one by each State, would be a more proper Tribunal than the Supreme Court. Be that as it may—I rather think the remedy must be found in an amendment of the Constitution." *

"From this view of the subject, the committee are of opinion, that the constitution of the United States, has been vio-

* Decision of the Supreme Court of Pennsylvania, December, 1798, in the case of *Republic vs. Cobbett*. McKean, Chief Justice.

lated by the decision of the Judge, and the constitutional rights of the state invaded. The question then occurs, in what manner is a state to defend her rights against such invasion? . . . In the case before us all the constituted authorities of the state have uniformly asserted their rights, and protested against every attempt to infringe them.

"It may be asked, who is to decide the question? If it be alleged the state has not the right, it may justly be replied, the power invading it, has not. It is a case unprovided for in the constitution, and there is no common umpire . . . Resolved," etc.*

The inability of the Court to fill the functions assigned it by Mr. Madison was so strikingly shown during the trouble between the North and South as to render it highly improbable that men of such experience as those who framed the Constitution could have intended to repose such functions in such an instrument; and, taken in conjunction with the fact that undeniably no such power is explicitly granted by the Constitution, these facts in themselves are, it would seem, sufficient to abrogate the claim to any such power in it.

At that time we find the Republican party, through its leaders,—as individuals, by State action, and in the courts,—denying and formally and effectually nullifying the authority of the Supreme Court as a final arbiter of Constitutional provisions. Mr. Lincoln, not only as candidate, as Senator, but as President, explicitly and repeatedly attacked it, and threatened to overcome its decisions by packing the Bench,—as was done in the legal tender cases later. From his attack upon it he drew his chief weapon in his debate with Mr. Douglas, which put him in line for the Presidential nomination.

"If the Supreme Court of the United States shall decide that States cannot exclude slavery from their limits, are you in favor of acquiescing in, adopting, and following such decision as a rule of political action?" Lincoln's 3d question to Douglas at Freeport.

"If I were in Congress, and a vote should come up on the

*Resolution of House of Representatives of Pennsylvania, February 3, 1810.

question whether slavery should be prohibited in a new Territory, in spite of the Dred Scott decision, I should vote that it should." Lincoln's Speech, July 10, 1856.

"We believe as much as Judge Douglas . . . in obedience to . . . the judicial department of government. We think its decisions on constitutional questions, when fully settled, should control not only the particular cases decided, but the general policy of the country . . . But we think the Dred Scott decision is erroneous. We know the court that made it has often overruled its own decision, and we shall do what we can to have it overrule this . . . Judicial decisions are of greater or less authority as precedents according to circumstances . . . If this important decision had been made by the unanimous concurrence of the judges, and without any apparent partisan bias, and in accordance with legal public expectation, and with the steady practice of the departments throughout our history, and had been in no part based on assumed historical facts which are not really true . . . it then might be, perhaps would be, factious, nay even revolutionary, not to acquiesce in it as a precedent. But when . . . we find it wanting all these claims to public confidence, it is not resistance . . . to treat it as not having yet quite established a settled doctrine for the country." *

"Put this and that together, and we have another nice little niche, which we may ere long see filled with another Supreme Court decision, declaring that the Constitution of the United States does not permit a State to exclude slavery from its limits . . . Such a decision is all that slavery now lacks of being lawful in all the States . . . We shall lie down pleasantly dreaming that the people of Missouri are on the verge of making their State free; and we shall awake to the reality instead that the Supreme Court has made Illinois a slave State." †

"I have endeavored to show you the logical consequences of the Dred Scott decision . . . I have stated, which cannot be gainsaid, that the grounds upon which this decision is made

* Lincoln's Speech, Springfield, June 26, 1857; Nicolay & Hay, Vol. II, p. 85.

† Lincoln, June 16, 1858, Nicolay & Hay, Vol. II, p. 37.

are equally applicable to the free states as to the free territories . . . What constitutes the bulwark of our own liberty and independence . . . Our reliance is in the love of liberty which God has planted in us. Our defence is in the spirit which prized liberty as the heritage of all men, in all lands everywhere. Destroy this spirit and you have planted the seeds of despotism at your own doors. Familiarize yourselves with the chains of bondage and you have prepared your own limbs to wear them . . . And let me tell you, that all these things are prepared for you by the teachings of history, if the elections shall promise that the next Dred Scott decision, and all future decisions will be quietly acquiesced in by the people." *

"Somebody has to reverse the decision, since it is made, and we mean to reverse it, and we mean to do it peaceably." Mr. Lincoln then quotes Jefferson: "'the Constitution has erected no such single tribunal, knowing that, to whatever hands confided, with the corruption, of time and party, its members would become despots.' We oppose the Dred Scott decision in certain ways . . . we oppose that decision as a political rule . . . We propose so resisting it as to have it reversed if we can." †

"I do not forget the position, assumed by some, that constitutional questions are to be decided by the Supreme Court; nor do I deny that such decisions must be binding, in any case, upon the parties to a suit, as to the object of that suit, while they are also entitled to very high respect and consideration in all parallel cases by all other departments of the Government . . . At the same time the candid citizen must confess that if the policy of the Government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal," ‡ etc.

* Lincoln, Edwardsville Speech, September 13.

† Douglas, Debates.

‡ Lincoln, First Inaugural.

Prior to the reprobated decision, Mr. Lincoln had expressed his willingness to abide thereby.

"I grant you that an unconstitutional act is not a law; but I do not ask and will not take your construction of the Constitution. The Supreme Court of the United States is the tribunal to decide such a question, and we will submit to its decisions; and if you do also there will be an end of the matter." *

The decision of that Supreme Court which Mr. Lincoln promises to support was that upon the question of slavery in the territories; *viz.*:

"No other specification is made, and the only one that could be made is, that the restoration of the restriction of 1820 making the United States territory free territory would dissolve the Union . . . Do you say that such restriction of slavery would be unconstitutional, and that some of the States would not submit to its enforcement? I grant you that an unconstitutional act," etc.

When, however, the Dred Scott decision came, bearing upon this very point, Mr. Lincoln, as has been seen, found reasons for not accepting it.³¹⁶³ But if Mr. Lincoln, or any other citizen, were able to accept or not accept a judgment of the Court, according as he (not the Court) was satisfied of its justice, etc., not the most progressive of Progressives, not the criminal in the dock, need object, in theory, to any of its powers.

"Let any one who doubts carefully contemplate that now almost complete legal combination—piece of machinery, so to speak—compounded of the Nebraska doctrine and the Dred Scott decision. Let him consider not only what work the machinery is adapted to do, and how well adapted; but also let him study the history of its construction, and trace, if he can, or rather fail, if he can, to trace the evidence of design and concert of action among its chief architects, from the beginning. . . .

* Speech at Galena, Ill., 1855 or 1856; Nicolay & Hay, Vol. II, p. 42.

"It will throw additional light on the latter, to go back and run the mind over the string of historical facts already stated. Several things will now appear less dark and mysterious than they did when they were transpiring. The people were to be left 'perfectly free,' 'subject only to the Constitution.' What the Constitution had to do with it outsiders could not then see. Plainly enough now, it was an exactly fitted niche for the Dred Scott decision to afterward come in, and declare the perfect freedom of the people to be just no freedom at all. Why was the amendment expressly declaring the right of the people voted down? Plainly enough now, the adoption of it would have spoiled the niche for the Dred Scott decision. Why was the court decision held up? Why even a senator's individual opinion withheld till after the presidential election? Plainly enough now, the speaking out then would have damaged the 'perfectly free' argument upon which the election was to be carried. Why the out-going President's felicitation on the indorsement? Why the delay of a reargument? Why the incoming President's advance exhortation in favor of the decision? These things look like the cautious patting and petting of a spirited horse preparatory to mounting him, when it is dreaded that he may give the rider a fall. And why the hasty after-indorsement of the decision by the President and others?

"We cannot absolutely know that all these exact adaptions are the result of preconcert. But when we see a lot of framed timbers, different portions of which we know have been gotten out at different times and places and by different workmen,—Stephen, Franklin, Roger, and James, for instance,—and we see these timbers joined together, and see them exactly make the frame of a house or a mill, all the tenons and mortises exactly fitting, and all the lengths and proportions of the different pieces exactly adapted to their respective places, and not a piece too many or too few, not omitting even scaffolding—or, if a single piece be lacking, we see the place in the frame exactly filled and prepared yet to bring such piece in—in such a case we find it impossible not to believe that Stephen and Franklin and Roger and James all understood

one another from the beginning, and all worked upon a common plan or draft drawn up before the first blow was struck. . . .

"Put this and that together, and we have another nice little niche, which we may, ere long, see filled with another Supreme Court decision declaring that the Constitution of the United States does not permit a State to exclude slavery from its limits. And this may especially be expected if the doctrine of 'care not whether slavery be voted down or voted up' shall gain upon the public mind sufficiently to give promise that such a decision can be maintained when made.

"Such a decision is all that slavery now lacks of being alike lawful in all the States. Welcome, or unwelcome, such decision is probably coming, and will soon be upon us, unless the power of the present political dynasty shall be met and overthrown. We shall lie down pleasantly dreaming that the people of Missouri are on the verge of making their State free, and we shall awake to the reality instead that the Supreme Court has made Illinois a slave State. To meet and overthrow the power of that dynasty is the work now before all those who would prevent that consummation. That is what we have to do. How can we best do it?" *

"A little now on the other point—the Dred Scott decision. Another of the issues he says that is to be made with me, is upon his devotion to the Dred Scott decision, and my opposition to it.

"I have expressed heretofore, and I now repeat, my opposition to the Dred Scott decision; but I should be allowed to state the nature of that opposition, and I ask your indulgence while I do so. What is fairly implied by the term Judge Douglas has used, 'resistance to the decision'? I do not resist it. If I wanted to take Dred Scott from his master, I would be interfering with property, and that terrible difficulty that Judge Douglas speaks of, of interfering with property, would arise. But I am doing no such thing as that; all that I am doing is refusing to obey it as a political rule. If I were in Congress, and a vote should come up on a question whether

* Speech at Springfield, Ill., 1858, Nicolay & Hay, Vol. I, pp. 240-244.

slavery should be prohibited in a new Territory, in spite of the Dred Scott decision, I would vote that it should.

"That is what I would do. Judge Douglas said last night that before the decision he might advance his opinion, and it might be contrary to the decision when it was made; but after it was made he would abide by it until it was reversed. Just so! We let this property abide by the decision, but we will try to reverse that decision. We will try to put it where Judge Douglas would not object, for he says he will obey it until it is reversed. Somebody has to reverse that decision, since it is made; and we mean to reverse it, and we mean to do it peaceably.

"What are the uses of decisions of courts? They have two uses. As rules of property they have two uses. First—they decide upon the question before the court. They decide in this case that Dred Scott is a slave. Nobody resists that. Not only that, but they say to everybody else that persons standing just as Dred Scott stands are as he is. That is, they say that when a question comes up upon another person, it will be so decided again, unless the court decides in another way, unless the court overrules its decision. Well, we mean to do what we can to have the court decide the other way. That is one thing we mean to try to do.

"The sacredness that Judge Douglas throws around this decision is a degree of sacredness that has never been before thrown around any other decision. I have never heard of such a thing. Why, decisions apparently contrary to that decision, or that good lawyers thought were contrary to that decision, have been made by that very court before. It is the first of its kind; it is an astonisher in legal history. It is a new wonder of the world. It is based upon falsehood in the main as to the facts,—allegations of facts upon which it stands are not facts at all in many instances,—and no decision made on any question—the first instance of a decision made under so many unfavorable circumstances—thus placed, has ever been held by the profession as law, and it has always needed confirmation before the lawyers regarded it as settled law. But Judge Douglas will have it that all hands must take

this extraordinary decision, made under these extraordinary circumstances, and give their vote in Congress in accordance with it, yield to it and obey it in every possible sense. Circumstances alter cases. Do not gentlemen here remember the case of that same Supreme Court, some twenty-five or thirty years ago, deciding that a national bank was constitutional? I ask if somebody does not remember that a national bank was declared to be constitutional? Such is the truth, whether it be remembered or not. The bank charter ran out, and a recharter was granted by Congress. That recharter was laid before General Jackson. It was urged upon him, when he denied the constitutionality of the bank, that the Supreme Court had decided that it was constitutional; and General Jackson then said that the Supreme Court had no right to lay down a rule to govern a coördinate branch of the government, the members of which had sworn to support the Constitution—that each member had sworn to support that Constitution as he understood it. I will venture here to say that I have heard Judge Douglas say that he approved of General Jackson for that act. What has now become of all his tirade against ‘resistance to the Supreme Court’?” *

“We oppose the Dred Scott decision in a certain way, upon which I ought perhaps to address you a few words. We do not propose that when Dred Scott has been decided to be a slave by the court, we, as a mob, will decide him to be free. We do not propose that, when any other one, or one thousand, shall be decided by that court to be slaves, we will in any violent way disturb the rights of property thus settled; but we nevertheless do oppose that decision as a political rule, which shall be binding on the voter to vote for nobody who thinks it wrong, which shall be binding on the members of Congress or the President to favor no measure that does not actually concur with the principles of that decision. We do not propose to be bound by it as a political rule in that way, because we think it lays the foundation not merely of enlarging and spreading out what we consider an evil, but it lays the foundation for spreading that evil into the States themselves. We

* Lincoln, speech at Chicago, 1858, *ibid.*, Vol. I, p. 254.

propose so resisting it as to have it reversed if we can, and a new judicial rule established upon this subject." *

"But he is desirous of knowing how we are going to reverse the Dred Scott decision. Judge Douglas ought to know how. Did not he and his political friends find a way to reverse the decision of that same court in favor of the constitutionality of the national bank? Didn't they find a way to do it so effectually that they have reversed it as completely as any decision ever was reversed, so far as its practical operation is concerned? And, let me ask you, didn't Judge Douglas find a way to reverse the decision of our Supreme Court, when it decided that Carlin's father—old Governor Carlin—had not the constitutional power to remove a secretary of state? Did he not appeal to the 'mobs,' as he calls them? Did he not make speeches in the lobby to show how villainous that decision was, and how it ought to be overthrown? Did he not succeed, too, in getting an act passed by the legislature to have it overthrown? And didn't he himself sit down on that bench as one of the five added judges who were to overslaugh the four old ones—getting his name of 'judge' in that way and in no other? If there is a villainy in using disrespect or asking opposition to Supreme Court decisions, I commend it to Judge Douglas's earnest consideration. I know of no man in the State of Illinois who ought to know so well about how much villainy it takes to oppose a decision of the Supreme Court, as our honorable friend, Stephen A. Douglas." †

In his proclamation, February 1862 (on the Habeas Corpus), he said :

"The judicial machinery seemed as if it had been designed not to sustain the government, but to embarrass and betray it."

Again in the case of Merryman he annulled the Chief Justice's decision.‡

* Speech in Quincy Joint Debate, 1858, *ibid.*, Vol. I, p. 463.

† Rejoinder in Quincy Debate, 1858, *ibid.*, Vol. I, pp. 481-482.

‡ Nicolay & Hay, Vol. IV, pp. 175, 176.

As Mr. Lincoln was the official as well as moral leader of his party, as such being elected to the Presidency, it is not really needful to this point to quote others. But in view of the ingenuity which has already been shown by apologists, it is excusable to multiply testimony. The Chicago Republican Convention which nominated him, referred to the decision in the following terms:

"That the present Democratic administration has far exceeded our worst apprehensions, . . . in its attempted enforcement, everywhere, on land and sea, through the intervention of Congress and of the federal courts, . . ."

The State of Maine resolved that

"The extra judicial opinion of the Supreme Court of the United States in the case of Dred Scott is not binding in law or conscience upon the government or citizens of the United States . . . The Supreme Court of the United States should, by peaceful and constitutional measures, be so reconstituted as to relieve it from the domination of a sectional faction, and make it a tribunal whose decision shall be in harmony with the Constitution of the United States and the spirit of our institutions."

The State of Massachusetts resolved that

"While the people of Massachusetts recognize the rightful judicial authority of the Supreme Court of the United States in the determination of all questions properly coming before it, they will never consent that their rights shall be impaired, or their liberties invaded, by reason of any usurpation of political power by the said tribunal."

Connecticut declared that the Judges

"have departed from the usages which have heretofore governed our courts; have volunteered opinions which are not law; have given occasion for the belief that they promulgated such opinions for partisan purposes, and thereby have lowered

the dignity of said court, and diminished the respect heretofore awarded to its decisions."

Mr. Thaddeus Stevens, whose influence in bringing on the war was certainly not inconsiderable, said :

"That decision, although in terms not as infamous as the Dred Scott decision, is yet far more dangerous in its operations upon the lives and liberties of the loyal men of this country." "Congressional Globe," Thirty-ninth Congress, Second Session, January 3, 1867, p. 255.

Mr. Seward, the leading Republican candidate for the Presidential nomination until Mr. Lincoln, almost unexpectedly, secured it, said :

"In this ill-omened act, the Supreme Court forgot its own dignity . . . and they and the President alike forgot that judicial usurpation is more odious and intolerable than any other among the manifold practices of tyranny." *

March 19, 1859, Wisconsin, through her courts, Legislature, and people's action, nullified the Fugitive Slave Law in the case of Sherman M. Booth.

"WHEREAS: The Supreme Court of the United States has assumed appellate jurisdiction in the matter of the petition of Sherman M. Booth for a writ of *habeas corpus* presented and prosecuted to a final judgment in the Supreme Court of this State, and has, without process, or any of the forms recognized by law, assumed the power to reverse that judgment in a matter involving the personal liberty of the citizen, asserted by and adjusted to him by the regular course of judicial proceedings upon the great writ of liberty secured to the people of each State by the Constitution of the United States :

"*And whereas:* Such assumption of power and authority by the Supreme Court of the United States, to become the final arbiter of the liberty of the citizen, and to override and nullify the judgments of the State Court's declaration thereof, is

* Seward on the Dred Scott Case, "Works," Vol. IV, p. 186.

in direct conflict with that provision of the Constitution of the United States which secures to the people the benefits of the writ of *habeas corpus*:

"Therefore, *Resolved (the Senate concurring)*, That we regard the action of the Supreme Court of the United States, in assuming jurisdiction in the case before mentioned, as an act of arbitrary power unauthorized by the Constitution, and virtually superseding the benefit of the writ of *habeas corpus*, and prostrating the rights and liberties of the people at the foot of unlimited power.

"*Resolved*, That this assumption of jurisdiction by the Federal judiciary in the said case, and without process, is an act of undelegated power, and, therefore, without authority, void, and of no force.

"*Resolved*, That the Government formed by the Constitution of the United States was not made the exclusive or final judge of the extent of the powers delegated to itself; but that, as in all other cases of compact among parties having no common judge, each has an equal right to judge for itself, as well of infractions as of the mode and measure of redress.

"*Resolved*, That the principle and construction contended for by the party which now rules in the councils of the nation, that the general Government is the exclusive judge of the extent of the powers delegated to it, stop nothing short of despotism; since the *discretion* of those who administer the Government, and not the *Constitution*, would be the measure of their powers; that the several States which formed that instrument, being sovereign and independent, have the unquestionable right to judge of its infractions; and that a *positive defiance* by those sovereignties of all unauthorized acts done under color of that instrument is the rightful remedy. Approved March 19, 1859." *

In this case, first, the Supreme Court of Wisconsin released a criminal imprisoned by a Court of the United States, and ordered its Clerk to disregard a writ of error from the Supreme Court of the United States; secondly, its Legislature de-

* Resolves of Wisconsin.

clared the decision of that Court "void and of no force," and that "the rightful remedy" of acts of the Federal government of which it might disapprove was "positive defiance."

"At this juncture, the new Federal administration came in, under a President [Buchanan] who had obtained success by the intervention at the polls of a third party—an ephemeral organization built upon a foreign and frivolous issue, which had just strength enough and life enough to give to a pro-slavery party the aid required to produce that untoward result. The new President, under a show of moderation, masked a more effectual intervention than that of his predecessor, in favor of slave labor and a slave State. Before coming into office, he approached, or was approached, by the Supreme Court of the United States. On their docket was, through some chance or design, an action which an obscure negro man, in Missouri, had brought for his freedom against his reputed master. The Court had arrived at the conclusion, on solemn argument, that, inasmuch as this unfortunate negro had, through some ignorance or chicane in special pleading, admitted what could not have been proved, that he was descended from some African who had been held in bondage, therefore he was not, in view of the Constitution, a citizen of the United States, and therefore could not implead the reputed master in the Federal Courts; and on this ground the Supreme Court was prepared to dismiss the action for want of jurisdiction over the suitor's person. This decision, certainly as repugnant to the Declaration of Independence and the spirit of the Constitution as to the instincts of humanity, nevertheless would be one which would exhaust all the power of the tribunal, and exclude consideration of all other questions that had been raised upon the record. The counsel who had appeared for the negro had volunteered from motives of charity, and ignorant, of course, of the disposition which was to be made of the cause, had argued that his client had been freed from slavery by operation of the Missouri prohibition of 1820. The opposing counsel, paid by the defending slave-holder, had insisted, in reply, that that famous statute was unconstitutional.

The mock debate had been heard in the chamber of the Court, in the basement of the Capitol, in the presence of the curious visitors at the seat of Government, whom the dulness of a judicial investigation could not disgust. The Court did not hesitate to please the incoming President, by seizing the extraneous and idle forensic discussion, and converting it into an occasion for pronouncing an opinion that the Missouri prohibition was void; and that, by force of the Constitution, slavery existed, with all the elements of property in man over man, in all the territories of the United States, paramount to any popular sovereignty within the territories, and even to the authority of Congress itself.

"In this ill-omened act the Supreme Court forgot its own dignity, which had always before been maintained with just judicial jealousy. They forgot that the province of a Court is simply '*jus dicere*,' and not at all '*jus dare*.' They forgot, also, that one 'foul sentence does more harm than many foul examples; for the last do but corrupt the stream, while the former corrupteth the fountain.' And they and the President alike forgot that judicial usurpation is more odious and intolerable than any other among the manifold practices of tyranny.

"The day of inauguration came, the first one, among all the celebrations of that great national pageant, that was to be desecrated by a coalition between the Executive and Judicial departments to undermine the national legislature and the liberties of the people. The President, attended by the usual lengthened procession, arrived, and took his seat on the portico. The Supreme Court attended him there, in robes which yet exacted public reverence. The people, unaware of the import of the whisperings carried on between the President and the Chief Justice, and imbued with veneration for both, filled the avenues and gardens far away as the eye could reach. The President addressed them in words as bland as those which the worst of all the Roman emperors pronounced when he assumed the purple. He announced (vaguely, indeed, but with self-satisfaction,) the forthcoming extra-judicial exposition of the Constitution, and pledged his submission to it as

authoritative and final. The Chief Justice and his Associates remained silent. The Senate, too, were there—constitutional witnesses of the transfer of administration. They, too, were silent, although the promised usurpation was to subvert the authority over more than half of the empire which Congress had assumed contemporaneously with the birth of the nation, and had exercised, without interruption, for nearly seventy years. It cost the President, under the circumstances, little exercise of magnanimity now to promise to the people of Kansas—on whose neck he had, with the aid of the Supreme Court, hung the millstone of slavery—a fair trial in their attempt to cast it off and hurl it to the earth when they should come to organize a State government. Alas! that even this cheap promise, uttered under such great solemnities, was only made to be broken.

“The pageant ended. On the 5th of March, the Judges, without even exchanging their silken robes for courtiers’ gowns, paid their salutations to the President in the Executive palace. Doubtless the President received them as graciously as Charles the First did the Judges who had, at his instance, subverted the statutes of English liberty. On the 6th of March, the Supreme Court dismissed the negro suitor, Dred Scott, to return to his bondage; and having thus disposed of that private action for an alleged private wrong, on the ground of want of jurisdiction in the case, they proceeded with mock solemnity to pronounce the opinion that, if they had had such jurisdiction, still the unfortunate negro would have had to remain in bondage unrelieved, because the Missouri prohibition violates rights of general property involved in slavery, paramount to the authority of Congress. A few days later, copies of this opinion were multiplied by the Senate’s press, and scattered in the name of the Senate broadcast over the land; and their publication has not yet been disowned by the Senate. Simultaneously, Dred Scott, who had played the hand of *dummy* in this interesting political game, unwillingly, yet to the complete satisfaction of his adversary, was voluntarily emancipated; and thus received from his master, as a reward, the freedom which the Court had denied him as a right.

"The new President of the United States having organized this formidable judicial battery at the Capitol, was now ready to begin his active demonstrations of intervention in the territory."

"A Joint Committee of the Senate and Assembly of New York, having been appointed to consider and report what measures, if any, the Legislature of this state ought to adopt to protect the constitutional rights of her citizens against the serious and alarming doctrines of the Supreme Court of the United States in the decision of the case of Dred Scott, reported through Judge Foot, in the Assembly, and Mr. Madden in the Senate, on the 9th of April, as follows, . . . 'in making this declaration we place the Empire State on the Republican doctrines of 1798, known as the "Virginia Resolutions" which were acquiesced in by the Great Republican party of that day, and are in the following words:

"*Resolved*, That this Assembly doth explicitly and peremptorily declare that it views the powers of the Federal Government as resulting from the compact, to which the States are parties, as limited by the plain sense and intention of the instrument constituting that compact; as no further valid than they are authorized by the grants enumerated in that compact; and that in case of a deliberate, palpable and dangerous exercise of other powers, not granted by the said compact the States, who are the parties thereto, have the right, and are in duty bound, to interpose for arresting the progress of the evil, and for maintaining within their respective limits the authorities, rights and liberties appertaining to them."

"To carry into effect this proposition, your committee recommend the adoption of the resolution herewith presented, and the passage of an act . . .

"*Resolution* . . . That the Supreme Court of the United States, by reason of a majority of the Judges thereof having identified it with a sectional and aggressive party, has lost the confidence and respect of the people of this State . . .' The act follows, nullifying the doctrine laid down by the Supreme Court. The Report of the Committee was adopted; and the Resolutions were passed, with an amendment to the second

Resolution, so as to make the last line read '*impaired* the confidence,' etc., instead of '*lost*,' etc. The Act passed the Assembly but was lost in the Senate for want of action at the close of the session."

"This view of the States, as corporate members of a Union by compact, was common throughout the North during the contest over the Fugitive Slave Law. Senator Wade of Ohio said in Congress in 1855: 'Who is to be the judge, in the last resort, of the violation of the Constitution of the United States, by the enactment of a law? Who is the final arbiter? The general government? or the States in their sovereignty? Why, sir! to yield that point is to yield all the rights of the States to protect their citizens; and to consolidate this government into a miserable despotism.' Again: 'I said there were States in this Union whose highest tribunals had adjudged that bill to be unconstitutional; and that I was one of those who believed it unconstitutional; and that under the old resolutions of 1798 a State must not only be the judge of that, but of the remedy in such case.' " *

"When the Civil War broke out, the Supreme Court came in conflict with President Lincoln. Chief-Justice Taney decided that only Congress could suspend the writ of habeas corpus. But Lincoln ordered his officers to disobey the writ of the Court; and they did it successfully. When Mr. Lincoln instituted a blockade, the Supreme Court would have rendered his work nugatory, only for the votes of three judges appointed by Mr. Lincoln himself.

"Not only the States and the Executive have thus negated the Court, but also Congress. In the violent struggle of reconstruction which followed the War of Secession, Congress, while impeaching the President as surpassing his constitutional rights, arbitrarily forbade the filling of a vacancy in the Supreme Court until the number of Associate Justices was reduced to six. The Constitutional number was nine. . . .

"The Court has been packed by the Executive to ensure the carrying out of measures. President Jackson, in order to

* Edward Payson Powell, "Nullification and Secession in the United States," pp. 70-71; N. Y., 1897.

secure an endorsement of his arbitrary dealing with the United States Bank, placed one of his cabinet on the bench. During the administration of President Grant the Legal Tender Act was declared unconstitutional. But the President finding a man who, as a State judge, had affirmed the constitutionality of the same law, selected him to fill a vacancy on the bench of Associates, and by the help of his vote the decision of the Court was reversed. . . .

"In 1819 the Court decided that Congress had constitutional right to charter its own banks in the States, contrary to the expressed wish and will of the people of said States. This decision was nullified as far as possible in several States. The contest in Ohio was most protracted and bitter. The State adopted the very same expedient for killing national banks that was adopted in 1862 by Congress to kill State banks. It undertook to tax them to death. In the end the State was beaten. But we find the legislature acting favorably on resolutions to this effect, that 'the doctrines asserted by the legislatures of Kentucky and Virginia in 1798 were sound and true; that the General Assembly asserts and will maintain the right of the States to tax the business and property of any private corporation chartered by Congress and doing business in the State; and that the General Assembly further protests against the doctrine that the political rights of the separate States and their powers as sovereign States can be settled by the Supreme Court of the United States in cases between individuals, and in which no State is a party direct.' " *

"That the States cannot and will not continue from time to time to nullify some irrational, or even a just decision of the Supreme Court, I do not believe. That the Executive will find at some future time good cause to again check or resist the Court is probable. That Congress will not show its popular character, and forbid the meddling of the Court is not at all probable. Contingencies will arise to show that the judiciary is not in any way above the other departments, or able to enforce authority over either the general government or

* Edward Payson Powell, "Nullification and Secession in the United States," pp. 74-76; N. Y., 1897.

the States. 'The people,' says von Holst, 'as all the constitutions say, are the sole possessors of political power; and they alone therefore can give the State its fundamental law. . . . Hundreds of thousands of citizens can act, of course, only through representatives as far as the drafting of the Constitution is concerned; but in these cases the people have reserved to themselves expressly and unconditionally the initiative as well as the final decision.' 'Popular sovereignty is the sole basis, not only in theory but in practice, of the entire legal system of the Union, as well as of the several States.' That our national government, in any branch of it, is beyond reach of the people; or has any sort of 'supremacy,' except a limited measure of power granted by the supreme people, is an error. Judge Cooley says: 'The want of sovereignty in the government, or in any branch thereof, follows so necessarily from the manner in which the Constitution was called into existence, that the tenth article of the Amendments was scarcely necessary to make it plain that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.' Of what use would be this limitation of the government, if the government itself can alone and supremely and finally judge whether itself is a trespasser?" *

Mr. Madison, writing to Judge Roane, September 2, 1819, says:

"It could not but happen, and was foreseen at the birth of the Constitution, that difficulties and differences of opinion might occasionally arise in expounding terms & phrases necessarily used in such a charter; more especially those which divide legislation between the General & local Governments; and that it might require a regular course of practice to liquidate & settle the meaning of some of them. But it was anticipated I believe by few if any of the friends of the Constitution, that a rule of construction would be introduced as broad & pliant as what has occurred. And those who recollect, and

* Powell, "Nullification and Secession in the United States," pp. 80-81; N. Y., 1897.

still more those who shared in what passed in the State Convention, thro' which the people ratified the Constitution, with respect to the extent of the powers vested in Congress, cannot easily be persuaded that the avowal of such a rule would not have prevented its ratification."

Possibly one of the matters which Mr. Madison recollected as having passed in the State Convention, through which the people ratified the Constitution, was a speech by that Judge Marshall, whom Mr. Jefferson,—not without cause,—afterwards accused of desiring to show that, notwithstanding the Eleventh Amendment, a State could be brought as a defendant to the bar of his Court, in which he said the following words:

"I hope that no gentleman will think that a State will be called at the bar of a Federal Court . . . It is not rational to suppose that the sovereign power shall be dragged before a Court."

APPENDIX 31G¹

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JUDGE MARSHALL, himself, agreed, in theory at least, with Mr. Jefferson.

"The gentleman from New York had relied on the second section of the third article of the Constitution, which enumerates the cases to which the JUDICIAL POWER of the United States extends, as expressly including that now under consideration. Before he examined that section, it would not be improper to notice a very material misstatement of it made in the resolutions offered by the gentleman from New York. By the constitution, the judicial power of the United States, is extended to all CASES *in law and equity* arising under the Constitution, laws and treaties of the *United States*; but the resolutions declare the judicial power to extend to ALL QUESTIONS arising under the Constitution, treaties and laws of the *United States*. The difference between the Con-

stitution and the resolutions was material and apparent. A *case* in law or equity was a term well understood, and of limited signification. It was a controversy between *parties*, which had taken a shape for judicial decision. If the judicial power extended to every *question* under the constitution, it would involve almost every subject proper for legislative discussion and decision; if to every *question* under the laws and treaties of the *United States*, it would involve almost every subject on which the executive could act. The division of power which the gentleman had stated could exist no longer, and the other departments would be *swallowed up by the judiciary*. . . .

“By extending the judicial power to *all cases in law and equity*, the constitution had never been understood to confer on the department ANY POLITICAL POWER WHATSOEVER. To come within this description, a question must assume a *legal form* for forensic litigation and judicial decision. There must be *parties to come into court*, who can be *reached by its process* and *bound by its power*; whose rights admit of ultimate decision by a tribunal to which they are bound to submit.

“A case in law or equity proper for judicial decision may arise under a treaty, where *the rights of individuals*, acquired or secured by a treaty are to be asserted or defended in court. As under the fourth or sixth article of the treaty of peace, with *Great Britain*, or under those articles of our late treaties with *France*, *Russia*, and other nations, which secure to the subjects of those nations their property within the *United States*; or, as would be an article which, instead of stipulating to deliver up an offender, should stipulate his punishment, provided the case was punishable by the laws and in the courts of the *United States*. But the judicial power cannot extend to *political compacts*, as the establishment of the boundary line between the American and British Dominions; the case of the late guarantee in our treaty with *France*; or the case of the delivery of a murderer under the twenty-seventh article of our present treaty with Britain.” *

* Speech in House of Representatives of U. S., in case of Jonathan Robins, 1799.

At a later date Mr. Webster pointed out a concrete illustration of the same principle:

"If large portions of public bodies, against their duty and their oaths, will persist in refusing to execute the Constitution, and do in fact prevent such execution, no remedy seems to lie by any application to the Supreme Court. The case now before the country clearly exemplifies my meaning. Suppose the North to have decided majorities in Congress, and suppose those majorities persist in refusing to pass laws for carrying into effect the clause of the Constitution, which declares that fugitive slaves shall be restored, it would be evident that no judicial process could compel them to do their duty, and what remedy would the South have?" *

APPENDIX 31G²

(II Page 167)

It was in regard to the dealings of Georgia with the Cherokee Indians that General Jackson, then President, is reported to have said, "John Marshall has made his decision. Now let him enforce it if he can."

Possibly it can scarcely be ascertained, at this date, whether Jackson really made this remark; but it is certain that his attitude in the matter was one of indifference, quite justifying South Carolina's retort to his Nullification Proclamation, *viz.*:

"*Resolved*, That the proclamation of the President is the more extraordinary, that he had silently, and as it is supposed, with entire approbation, witnessed our sister state of Georgia avow, act upon, and carry into effect, even to the taking of life, principles identical with those now denounced by him in South Carolina." December 20, 1832. At any rate the anecdote aptly illustrates the slight power possessed by the Court for the functions attributed to it by Mr. Madison.

* Speech at Capon Springs, June 28, 1851.

The opinion of the gentleman who is credited with furnishing the law of President Jackson's Proclamation follows, *viz.*:

"The States existed before the Constitution; they parted only with such powers as are specified in that instrument; they continue still to exist with all the powers they have not ceded; and the present government itself would never have gone into operation had not the States in their political capacity consented. That consent is a compact; it is a compact by which the people of each State have consented to take from their own legislatures some of the powers they had conferred upon them, and to transfer these with other enumerated powers to the government of the United States, created by that compact. Although the Supreme Court must judge of the constitutionality of laws, and its decrees must be final, I am far from thinking this Court is created an umpire to judge between the General and State governments. In an extreme case an injured State would have a right at once to declare that it would no longer be bound by a compact which had been grossly violated." *

APPENDIX 31G²

"HERE we must listen once more to Mr. Livingston: 'If, in creating a sovereign nation, a sovereign power was given by sovereign States, whereby they yielded power to judge of national legislation, the question is settled. Clearly nothing of the kind was done. But a court was created to review Congressional action, and, with great deliberation, pass upon the Constitutional quality of such action.' But as has been shown in Chapter First, such a court has proved to be inconclusive. Its decisions have been challenged by Congresses, by Presidents, by State Legislatures, by State Courts." †

* Edward Livingston, in speech in Senate; Edward Payson Powell, "Nullification and Secession in the United States," pp. 271-272; New York, 1897.

† Edward Payson Powell, "Nullification and Secession in the United States," pp. 274-275; New York, 1897.

APPENDIX 31G³*(II Page 172)*

Under these circumstances can the truth of Mr. Toombs's speech of January 7, 1861, be impeached?

"You say we cannot decide the compact for ourselves. Well can the Supreme Court decide it for us? Mr. Lincoln says he does not care what the Supreme Court decides, he will turn us out anyhow (viz. from the Territories) . . . Then you do not accept that arbiter. You will not take my construction; you will not take the Supreme Court as an arbiter; you will not take the practice of the government; you will not take the treaties under Jefferson and Madison; you will not take the opinion of Madison, upon the very question of prohibition in 18. What then will you take? You will take nothing but your own judgment . . . Your party says you will not take the decision of the Supreme Court. You said so at Chicago; you said so in Committee."

As irresistibly follows the truth of Mr. Clay (of Alabama) in the Senate, January 22, 1861:

"To crown the climax . . . this party nominated to the Presidency a man who not only indorses the platform, but promises . . . to disregard the judgments of your courts . . . by approving any bill prohibiting slavery in the territories of the United States . . . The freemen of Alabama . . . have learned from history the admonitory truth, that the people who live under Governors appointed against their consent by unfriendly foreign or confederate States, will not long enjoy the blessings of liberty, or have the courage to claim their," etc.

APPENDIX 31H

(II Page 82)

THE gist of the Virginia Resolutions and Reports is as follows, *viz.*:

"It appears, to your committee to be a plain principle, founded in common sense, illustrated by common practice, and essential to the nature of compacts, that, where resort can be had to no tribunal superior to the authority of the parties, the parties themselves must be the rightful judges in the last resort, whether the bargain made has been pursued or violated. The constitution of the United States, was formed by the sanction of the States, given by each in its sovereign capacity. It adds to the stability and dignity, as well as to the authority of the Constitution, that it rests on this legitimate and solid foundation. The states, then, being parties to the constitutional compact, and in their sovereign capacity, it follows of necessity, that there can be no tribunal above their authority, to decide in the last resort, whether the compact made by them be violated; and, consequently, that, as the parties to it, they must themselves decide in the last resort, such questions as may be of sufficient magnitude to require their interposition," etc., etc.*

That of the Kentucky Resolutions (formulated by the same mind which framed the Declaration of Independence) is as follows:

"1. *Resolved*, That the several States composing the United States of America, are not united on the principles of unlimited submission to their General Government; but that by compact under the style and title of a Constitution for the United States, and of amendments thereto, they constituted a General Government for special purposes, delegated to that Government certain definite powers, reserving each State to itself, the residuary mass of right to their own self-government; and that whensoever the General Government assumes unde-

* Madison, Report on Virginia Resolutions.

gated powers, its acts are unauthoritative, void, and of no force: That to this compact each State acceded as a State, and is an integral party, its co-States forming as to itself, the other party: That the Government created by this compact was not made the exclusive or final judge of the extent of the powers delegated to itself; since that would have made its discretion, and not the Constitution, the measure of its powers; but that as in all other cases of compact among parties having no common judge, each party has an equal right to judge for itself, as well of infractions, as of the mode and measure of redress. . . .

"9. *Resolved*, lastly . . . And that therefore, this Commonwealth is determined, as it doubts not its Co-States are, tamely to submit to undelegated and consequently unlimited powers in no man or body of men on earth:" etc. Kentucky Resolutions of 1798.

"Lest, however, the silence of this commonwealth should be construed into an acquiescence in the doctrines and principles advanced, and attempted to be maintained, by the said answers; or at least those of our fellow-citizens, throughout the Union, who so widely differ from us on those important subjects, should be deluded by the expectation that we shall be deterred from what we conceive our duty, or shrink from the principles contained in those resolutions,—therefore,

"*Resolved*, that this commonwealth considers the federal Union, upon the terms and for the purposes specified in the late compact, conducive to the liberty and happiness of the several states. That it does now unequivocally declare its attachment to the Union, and to that compact, agreeably to its obvious and real intention, and will be among the last to seek its dissolution: That, if those who administer the general government be permitted to transgress the limits fixed by that compact, by a total disregard to the special delegations of power therein contained, an annihilation of the state governments, and the creation, upon their ruins, of a general consolidated government, will be the inevitable consequence: That the principle and construction, contended for by sundry of the state legislatures, that the general government is the

exclusive judge of the extent of the powers delegated to it, stop not short of *despotism*—since the discretion of those who administer the government, and not the Constitution, would be the measure of their powers: That the *several states* who formed that instrument, being sovereign and independent, have the unquestionable right to judge of the infraction; and, That a nullification, by those sovereignties, of all unauthorized acts done under color of that instrument, is the rightful remedy.” *

It is indisputably obvious that, if these Virginia and Kentucky Resolutions mean, as on their face they seem to mean, that *each* State has the right to judge for itself whether the Constitutional compact has been violated, and if so, of the means of redress, then in Mr. Madison’s, as well as in Mr. Jefferson’s, opinion at that time, the Constitution stood in that respect upon those principles of international law exposed by Mr. Madison, replying to Mr. Patterson, in the Federal Convention, fully justifying nullification, or, at any rate, secession by a State.

But, in these his later arguments, Mr. Madison states that the meaning of the Virginia and Kentucky Resolutions was, that the States concurrently or unanimously possessed the right claimed for them by the Resolutions; and that those Resolutions by no means attributed this right to the States severally. This meaning seems improbable, if not incredible, upon two grounds: first, what may be called historical testimony; second, the nature of the Resolutions. They are now to be considered.

Mr. John Taylor of Caroline, and Mr. Jefferson, as has been said, were, at least equal parties with Mr. Madison, of the conference at which was formulated the creed of the Virginia and Kentucky resolutions.† Mr. Taylor was the mover of the Resolutions in the Virginia Legislature. Also he was credited with being responsible for the erection of the Virginia Armory, then much talked of in connection with the Resolutions.

* Kentucky Resolutions, 1799.

† The other conferees were Messrs. George Nicholas, Wilson Cary Nicholas, and John Breckinridge.

It is to be supposed that he was fully acquainted with the intent of those Resolutions. Besides this, his testimony is of high value on account of his unimpeached character for honour and disinterestedness.

The Editor of his "Letters to Thomas Ritchie," published in 1809, says as follows :

"Of the writer, it is not necessary to say much. His character for patriotism, for talents, for integrity, and particularly for his devotion to the republican cause in the years 1797, 98, and 99, are well known and will be long and gratefully remembered. We may go farther, and say, that the effect of his services, will be felt for years to come. Indeed, we are invited to believe, and have no difficulty in saying, from a knowledge of that particular period of our political history, that if Col. Taylor, in the year 1797, had gone over to the federal party, or had remained even neutral as many flaming PATRIOTS of the present day did, the cause of republicanism, then sinking, and supported only by Virginia and Kentucky, could probably have been overwhelmed."

Both Mr. Taylor and Mr. Jefferson died before Mr. Madison's writings here in question. But each of them left sufficiently plain indications of his understanding of the rights of a several State. Some of Mr. Taylor's opinions have already been quoted; possibly the following is more directly to the point at issue, *viz.*:

"But how can the posture masters of words, dispose of the clear and explicit term 'respectively' used in amendment of the constitution? Could a plainer have been found in the English language to express its meaning? Powers are reserved to the United States 'respectively.' Whatever these were, they were reserved by this expression separately and not collectively to the States. Either the right of internal self government was among them, or no State has any such right. Among them, also, was the unimpaired right of election in the people of each State, for the purpose of local State government, or the people of no State have any such right. The

people of each State held no other power which the reservation could secure. The reservation of this right, would have been quite nugatory, coupled with a power in Congress and the Supreme Court to render it inoperative. State local rights, being reserved separately to each State, cannot be either preserved, or taken away by the States collectively; and a right of separate preservation must attend each separate reservation, or the reservation is void. Many men have no authority to defend one man's title to his estate. Massachusetts could not resist the aggression upon the local law of Virginia by the Supreme Court in the lottery case, nor that upon the local law of Ohio in the bank case. It was for this unanswerable reason, that the right of internal self government was reserved to the States separately or respectively. There existed no medium between this separate reservation, and a consolidated republic which was proposed and rejected. Had the constitution, after having reserved the right of internal self government to the States, or the people 'respectively,' added, 'but Congress or the Supreme Court shall have a power to control this reservation to the States or to the people, respectively,' it would have been an absurd contradiction, and the same absurdity attends such a construction of the constitution. If the States respectively, cannot resist aggressions, respectively or separately made upon the separate right of each to internal self government, they cannot be resisted at all; because the right being separate, the resistance must necessarily be separate also, or a consolidated republic must ensue. To prevent this, the reservation was to the States 'respectively.' The elective power in all the States, had no original right to control the elective power in each State, or to regulate its government either externally or internally. As to the former only, the separate elective powers of the States were united; but as to the right of internal self government, the separate elective power of each State was left untouched by the limitation of powers confined to the Federal government; and also by the positive reservation. With respect to local State government, the States were left in the same relation to each other, which existed previously to the Union; and since this relation never

invested the people of all the States, with any power to regulate the internal government of one State, the people of all the States could not invest Congress or the court with a power which they had not themselves; nor could Congress by a judicial law, invest the Supreme Court with the same power. It seems therefore, quite certain, that this project for introducing a consolidated republick, is literally inconsistent with the amendment, intended to preserve a federal republick.

"The expediency of investing Congress or the court, or both, with a negative power over the local acts of the State governments, opens a wider field for reasoning. If it is conceded that fellow-feeling and responsibility bestow on representation all its honesty and all its value, it must inevitably follow, that the principle of election, as exercised by all the States in reference to the Federal government, does not possess either of these essential characters of representation, in reference to the State governments. These do not exercise their reserved rights in one mode, nor adopt the same internal regulations. It cannot therefore often happen, that a conflict will take place between federal and reserved powers, which involves all the States equally; and it will but seldom happen that more than one State at a time will have occasion to resist an aggression upon its reserved rights, on account of the dissimilarity between the laws of the States respectively. In such cases the people of the other States possess neither of the essential characters of representation as to the State attached; and, therefore, by their election, they could not infuse these characters into their representatives. By considering the people of the other States or their representatives, as a representation of the people of the injured State, the great principles of election and representation for the freedom and security of internal State government, would be completely destroyed. It is obvious that sympathy and responsibility as to internal laws would be thus obliterated, or at least too feeble to repel particular aggressions upon the right of internal self government, and that if some inoperative sympathy might exist, there would not exist a vestige of responsibility in the people of the other States, or in representatives chosen by them, to the peo-

ple of the injured State. Neither of them feel an internal State law. By substituting this fungus of representation, this metaphysical prolusion, this oyster-like substratum, without an organ of active vitality, as a foundation for State rights, and the solitary security for a federal government, instead of State election and representation, the constitution is supposed to have created two of the most effectual weapons for the destruction of both which could have been devised. One is a maxim—Divide and conquer. Division is an inevitable security for victory, if the Federal government should be prudent enough to assail State rights successively, as indeed it must generally be, from the unconnectedness of State legislation. But as if this weapon was not sufficient for their demolition, it is rendered inevitably fatal by the superadded doctrine, that no one of these divisions, no single State when assailed, shall possess the right of self-defence, but must stake its existence or liberty on volunteers uninfluenced by fellow-feeling or responsibility, and who may possibly be influenced by adverse local prejudice. If it is admitted that a division of Federal and State powers can alone prevent a consolidated republick, that this species of government threatens us with a worse, and that a genuine representation of local State rights is necessary to sustain this division; it is evident that this representation must be of the States 'respectively,' or that the end cannot be effected. A proof of this conclusion results from considering the nature of the united representation of the States. There is great ingenuity in eluding this proof. We are told that it is the people of all the States; and that the people of all may be more safely relied upon to preserve both State and Federal rights, than the people of one. This is very plausible. Federal representation is the people, therefore we have already a consolidated republick; because the people of all the States are sovereign, representation is the people, and sovereignty can do anything. The guardianship of State rights, reserved to the people of each State respectively, is thus transferred exclusively to Congress, which may again transfer it to the Federal court, and the work of introducing a consolidated republick is dexterously finished. But what were the powers

which confederated? If they were not both something and also distinct, they could not have confederated. If they were any thing, they were different societies of people. The existence of societies supposes a sovereignty in each society, and this sovereignty can only be found in the people of each State as associated. If the Constitution is not a confederation, but the work of all the people of all the States, acting individually and not in an associated capacity, they yet thought it expedient for the preservation of their own liberties, to establish a Federal government for some purposes, and State governments for others; and resorted to representation for effecting both objects; but it is now urged that in this they acted unwisely; and thus we are brought back to the old question of a consolidated republick, considered and rejected by the people themselves; if the convention was the people, and the project secretly proposed is now openly advocated, not in a convention, but by unknown, avaricious, or ambitious individuals.

“The most recondite artifice and contradiction, and yet the most effectual for destroying the division of power once thought to be expedient and wise, couches under the great argument used to effect this object. Shall the people of one State construe the constitution for the people of all the States? The ingenuity of this argument consists in its capacity for receiving, from the advocates of a consolidated republick, the answers both no and yes. If the question is divided, and they are first asked, whether one State can defend its reserved rights, they answer No; but if they are asked whether Federal powers can be extended, through the instrumentality of one State, they answer, Yes. In this case one State may construe the constitution for all the States, because it will advance the project of a consolidated republick; but not in the other, because it will sustain a federal republick. Thus, if one State submits to have one of its reserved powers questioned, tried, and abolished by the Federal court, this submission and decision becomes a precedent for construing the constitution, though the act of one State only; and is binding on all the States in the eyes of the consolidating project, though they were not parties to this species of political or constitutional

law-suit, any more than they would be parties to a political collision between the Federal and a State government. Accordingly the bank suit of Maryland is to bind Ohio, and the lottery suit of Virginia is to bind all the other States. It might even happen that some interested but secret motives might, by these law-suits, bring in question State powers, with an apparent affectation of defending them, but a real intention of losing them; and that thus these State powers might be gradually retrenched and finally destroyed by the collusions of individuals. In point of wisdom, safety, and expediency, which is best—to depend upon *ex parte* or collusive law-suits for the construction of the constitution, which may alter it without the consent of the people or the States; or to depend upon the elective power of the people of each State, to keep their representatives within the bounds of the constitution? By one mode of construing the constitution, the right of internal self-government is lost to all the States; by the other, all retain it, because the resistance of one State to an unconstitutional aggression, leaves the rest free to use their own judgments, and to resist or not, according to their own will, should they also be attacked. But the mode of making constitutions as common law is made, by precedents made by judges, is conclusive upon the States, without any exercise of their judgments at all. If inconveniences may attend the right of a State to construe the constitution; which are however more speculative than real; yet it may be better to suffer them, then (*sic*) to incur the misfortune of a consolidated republic; or at least inferiour to those which will arise from suffering the Supreme Court by the instrumentality of one State, or some faction, or some individual fraud, to splinter the constitution. Election is a powerful remedy against inconveniences arising from the former policy; it is none against those arising from the latter. It would be strange, whilst we cling to the idea of representation in making laws, that we should imagine it to be unwise in making constitutions. Ambition however has always thought it highly inconvenient. Here, as is commonly observable in the freest countries, it is particularly ingenious. It proposes to destroy a real and

active majority, by the idea of an imaginary and inactive majority; and a representation in fact, by pretending that it will produce more inconveniences than no representation at all. According to this recent doctrine, no one political department can vindicate the powers committed to it by the conventional majority, because no one department represents a majority of people in all the United States. This conventional majority being dead, and incapable of current use, is however made to furnish an idea with which to destroy the rights of the political departments created by it when alive. But the argument proves too much for those who use it. The climax by which it is brought out is this: The constitution is the act of the people of the United States; those representing a majority of these people, have the exclusive right of construing it; but the State governments do not represent this majority; and therefore they cannot construe it at all. If the argument is sound, the conclusion is, that as no political department represents a majority of the people of the United States, none can construe the Constitution. The legislative Federal department is far from doing so, from the construction of the Senate; and the House of Representatives is only one constituent of that department, of itself, imbecile. The argument, however, is unsound under any policy, by which a majority establishes divisions of power, because the checks and balances of such a policy are exercised, not by departments representing a majority, but by departments acting under the authority of the majority which created them; and if these divisions are deprived of the right of self-preservation, by which only such checks and balances can effect the objects intended, it is, under a feigned submission, an actual rebellion against the majority by which they were established. Therefore the powers of the States being bestowed or reserved by a majority of the States or of the people, no matter which; any State would disobey the majority, and thus betray the national right of self-government in the federal form, by suffering itself to be deprived of these powers. A division and a consolidation; checks and no checks; cannot exist together. Political checks are designed to counterpoise each other, and the majority which

creates them, never intends that a pretended veneration for an inoperative idea of itself, should defeat its own precautions to preserve its own liberty. The majority which made the Federal Constitution, defined the only modes by which a majority for altering it could be brought into operation, and this definition proves that an inoperative idea of a speechless majority, was not contemplated as sufficient to destroy the divisions of power, established by an articulating majority. The provision for an articulating majority, was suggested by the consideration, that political divisions of power were not subjected to any other tribunal. Loyalty was expected from these divisions of power by the majority which created them, in exercising and defending their respective trusts; and by providing a mode for supervising them, by a majority only both of the people and of the States, it disclosed an intention that they should be supervised in no other mode. The specified supervising political tribunal would have been unnecessary, if the supreme court had been contemplated as such a tribunal. Suppose it had been proposed in the convention 'that, for the preservation of the Union, no political department, not representing a majority of the people of all the United States, should have a right to defend and maintain the powers allotted to it.' Would the adoption of this amendment have been wise or expedient? Yet its adoption would have been exactly equivalent to the chief argument, by which the right of defending themselves individually is denied to the States.

"This argument is enforced by the most exquisite derision of the States, of the people, and of human nature itself; the derision of contempt under an affectation of fear. It is gravely suggested that the Union is endangered by the ambition of the States. And what are the proofs of this tremendous ambition which meditates the destruction of the confederation? One State prohibits within its own territory an exclusive banking privilege, and another, the sale of lottery tickets. Is it not a broad grin at common sense to tell it, that such local State powers will destroy the Union? It was once asserted that the alien and sedition laws, like banking and lotteries, were necessary to preserve the Union. They are dead

and the Union lives. Had the States resisted those laws successfully, by judicially liberating the persons unconstitutionally prosecuted under them, a great outcry would have been uttered by the consolidating party, that the Union was destroyed; yet it would have stood exactly where it now does. If the banking and lottery laws were also dead, might not the Union still live? Did either of these State resistances touch any of the Federal powers necessary to maintain the Union, or disclose the least symptom of ambition in any State to obtain any active power? The general interest was excited, though slowly, by the alien and sedition laws; because, though partially executed, they were of a general import, and produced a remedy, of which encroachments interesting only to one State are not susceptible. The laws were consigned to the grave, and the party which made them dislodged from power. Was this destructive of the Union, or did it teach a consolidating faction, that it was safer to assail the States in detail, than by general attacks? Two observations of great force present themselves; one, that as the Federal government was designed to operate generally upon all the States for the sake of union, its partial operation upon one or a few, dismembers the intended combination and reinstates separate inimical interests; and is therefore radically unconstitutional, as defeating the very end and design of the Constitution; the other, that these frivolous charges of ambition, though egregiously magnified by all the arts of misrepresentation, only demonstrate that no such ambition exists, or that the States do not possess the means for gratifying it." *

Is it, reasonably speaking, possible to believe, that the writer of the foregoing supposed himself to be moving a resolution looking *only* to *concurrent* action by all the States, when he moved the Virginia Resolution? †

Mr. Madison says that "The Kentucky Resolutions being less guarded" might be more readily perverted. It may be difficult to imagine a form of speech "less guarded"; it is cer-

* John Taylor of Caroline, "Tyranny Unmasked," pp. 314-325; Washington, 1822.

† *Vide*, also Appendices 32^{B1} and 34^{A1} for matter by J. Taylor.

tainly difficult to imagine one more direct. If those Resolutions did not mean that each party to the compact, *i. e.*, every State separately, had the right to judge whether or no the other States kept their bargain with it; and also had the right to select its own method of redressing what it believed to be infractions of that bargain, it is hopeless to try to understand the meaning of any act under which we live.

"That to this compact each State acceded as a State, and is an integral party, its Co-States forming as to itself the other party . . . that, as in all other cases of compact among parties having no common judge, each party has an equal right to judge for itself, as well of infractions, as of the mode and measure of redress."

What meaning can be attached to these words, other than that each State is a party to the compact, and, as such, has the right to take such measures of redress for its infraction, as seems to it proper?

Yet these Resolutions were more than once endorsed in those debates of the Virginia Assembly of which Mr. Madison says: "That the Legislature could not have intended to sanction such a doctrine is to be inferred from the debates in the House of Delegates . . . the tenor of the debates . . . discloses no reference whatever to a constitutional right in an individual State to arrest by force the operation of a law of the U. S."; *e. g.* Mr. Taylor said, in defending them:

"That firmness as well as moderation could only produce a desirable coincidence between the States, an example of which having been already set by Kentucky," etc.

"Herewith we submit to your consideration the opinions of a sister state respecting these laws, which will supersede the necessity of farther observations from us." 1st Reading of An Address of the General Assembly to the People of the Commonwealth of Virginia. Jan. 15, 1799.

"In a letter concerning the Kentucky Resolutions, he (Jefferson) says he desired to leave the matter in such a train as that they should 'not be committed absolutely to push the mat-

ter to extremities; and yet free to push as far as the events render prudent.' It is certain however, that Jefferson had become fully alarmed at the encroachments of power, and had made up his mind that liberty must be sustained at all cost. Virginia built a great armory at Richmond, and prepared for whatever contingency might occur. Adams justly termed the position, not only of Virginia and Kentucky but of 'the whole South and West, as Menacing.' " *

Mr. Jefferson's opinions, as stated in other places, afford no reason to suppose that his Kentucky Resolutions meant an iota less than their plain and obvious meaning, *viz.*: that the redress of her grievances lay with the afflicted State,—not in the sympathetic concurrence of the authors of those grievances.

Mr. Jefferson wrote, at another time and on another grievance:

"The solemn Declaration and Protest of Virginia, on the principles of the Constitution of the United States of America, and on the violations of them."

This says:

"We, the General Assembly of Virginia, on behalf, and in the name of the people thereof, do declare as follows:

"The States in North America which confederated to establish their independence of the government of Great Britain, of which Virginia was one, became, on that acquisition, free and independent States, and as such, authorized to constitute governments, each for itself, in such form as it thought best.

"They entered into a compact (which is called the Constitution of the United States of America), by which they agreed to unite in a single government as to their relations with each other, and with foreign nations, and as to certain other articles particularly specified. They retained at the same time, each to itself, the other rights of independent government, comprehending mainly their domestic interests. . . .

"But the federal branch has assumed in some cases, and

* Edward Payson Powell, "Nullification and Secession in the United States," pp. 64-65; New York, 1897.

claimed in others, a right of enlarging its own powers by construction, inferences, and indefinite deductions from those directly given, which this assembly does declare to be usurpations of the powers retained to the independent branches, mere interpolations into the compact, and direct infractions of it.

"They claim, for example, and have commenced the exercise of a right to construct roads, open canals, and effect other internal improvements within the territories and jurisdictions exclusively belonging to the several States, which this assembly does declare has not been given to that branch by the constitutional compact, but remains to each State among its domestic and unalienated powers, exercisable within itself and by its domestic authorities alone.

"This assembly does further disavow and declare to be most false and unfounded, the doctrine that the compact, in authorizing its federal branch to lay and collect taxes, duties, imposts and excises to pay the debts and provide for the common defence and general welfare of the United States, has given them thereby a power to do whatever *they* may think, or pretend, would promote the general welfare, which construction would make that, of itself, a complete government, without limitation of powers; . . .

"Whilst the General Assembly thus declares the rights retained by the States, rights which they have never yielded, and which this State will never voluntarily yield, they do not mean to raise the banner of disaffection, or of separation from their sister States, co-parties with themselves to this compact. They know and value too highly the blessings of their Union as to foreign nations and questions arising among themselves, to consider every infraction as to be met by actual resistance. They respect too affectionately the opinions of those possessing the same rights under the same instrument, to make every difference of construction a ground of immediate rupture. They would, indeed, consider such a rupture as among the greatest calamities which could befall them; but not the greatest. There is yet one greater, submission to a government of unlimited powers. It is only when the hope of avoiding this

shall become absolutely desperate, that further forbearance could not be indulged. Should a majority of the co-parties, therefore, contrary to the expectation and hope of this assembly, prefer, at this time, acquiescence in these assumptions of power by the federal member of the government, we will be patient and suffer much, under the confidence that time, ere it be too late, will prove to them also the bitter consequences in which that usurpation will involve us all. In the meanwhile, we will breast with them, rather than separate from them, every misfortune, save that only of living under a government of unlimited powers. We owe every other sacrifice to ourselves, to our federal brethren, and to the world at large, to pursue with temper and perseverance the great experiment which shall prove that man is capable of living in society, governing itself by laws self-imposed, and securing to its members the enjoyment of life, liberty, property, and peace; and further to show, that even when the government of its choice shall manifest a tendency to degeneracy, we are not at once to despair but that the will and the watchfulness of its sounder parts will reform its aberrations, recall it to original and legitimate principles, and restrain it within the rightful limits of self-government. And these are the objects of this Declaration and Protest." *

It would seem impossible to explain this in any other manner than as a declaration of the *right* of a sovereign state to secede from the Union, or redress its wrongs in such way as seems best to itself; while also declaring that, for specified reasons, it does not see fit at the time to exert its rights to extremity.

The following is, if possible, more absolutely explicit: "And with no body of men is this restraint more wanting than with the judges of what is commonly called our general government. They are practising on the constitution by inferences, analogies, and sophisms, as they would on an ordinary law. They do not seem aware that it is not even a *constitution*, formed by a single authority, and subject to a single

* "Works," Vol. IX., pp. 496-499; N. Y., 1854.

superintendence and control; *but that it is a compact of many independent powers, every single one of which claims an equal right to understand it, and to require its observance.*" *

To return to the other member of the triumvirate chiefly responsible for the Resolutions of 1798:

"The best restraint upon legislative acts tending to the destruction of a true republican government, consists of the mutual right of the general and state governments to examine and controvert before the publick each others' proceedings. This right is stated in certain resolutions which passed the legislature of Kentucky on the 8th of November, 1798, in the following words, 'Resolved, that the several States comprising the United States of America, are not united on the principle of unlimited submission to their general government; but that by compact under the style and title of a constitution for the United States and of amendments thereto, they constituted a general government for special purposes, delegated to that government certain definite powers, reserving each State to itself, the residuary mass of right to their own self government; and that whensoever the general government assumes undelegated powers, its acts are unauthoritative, void, and of no force. That to this compact each state acceded as a State, and is an integral party, its co-states forming as to itself, the other party. That the government created by this compact was not made the exclusive or final judge of the extent of the powers delegated to itself, since that would have made its discretion, and not the constitution, the measure of its powers; but that, as in all other cases of compact among parties having no common judge, each party has an equal right to judge for itself as well of infractions, as of the mode and measure of redress.'

"The style of these resolutions throughout ascertains the author. Both the parties of the United States have asserted and denied this doctrine, as they happened to be in or out of power; for or against the existing administration. But I am

* Italics by B. S. Letter to E. Livingston, "Jefferson's Works," edited by H. A. Washington; Vol. VII, pp. 403-404; N. Y., 1853.

unable to discern any better resource for the preservation of civil liberty, than it affords." *

"Both the English king and our president are the exclusive managers of negotiation; and secrecy is their common maxim. By negotiation, foreign governments may be provoked; by secrecy, a government may delude and knead a people into a rage for war; and war is a powerful instrument for expelling the element of self government, and introducing that of force. This has been recently demonstrated in France. By negotiation, secrecy and war, traitors convert a national detestation of tyranny into a tool for making tyrants.

"The assembly of Virginia, in their resolutions of December 1798, after stating 'that a *spirit* has in sundry instances been manifested by the federal government, to enlarge its powers,' concludes 'so as to consolidate the states by degrees, into one sovereignty, the obvious tendency and *inevitable* result of which would be, to transform the present republican system of the United States, into an *absolute*, or at best a mixed monarchy.' The resolutions of the Kentucky legislature of November 1798, after stating a similar *spirit* in the federal government, observe 'that these, and successive acts of the same character, unless arrested at the threshold, may tend to drive these states into *revolution and blood*, and will furnish new calumnies against republican governments, and new pretexts for those who wish it to be believed, that man cannot be governed but by a *rod of iron*, etc.' "

"The people are the only safe guardians of their own liberty. The component parts of government are the creatures of the constitution. A subjection of the creator to the created, is a reversal of the course of nature. The constitution is a limitation to legislative power. It insulates arbitrary designs, and continually pronounces, 'thus far shalt thou go.' But suppose a legislature should go further. Is the veto abortive? . . . or is it to be enforced and by whom? †

* John Taylor, of Caroline, "Inquiry into the Principles and Policy of the Government of the United States," 1814, pp. 649-650.

† *Ibid.*, pp. 173-174; 1814.

"Without legislative encroachment or connivance, no infringement upon the constitution can happen. The laws will act upon and restrain individuals, by the enforcement of the courts of justice; but the constitution only can act upon the legislature, by the enforcement of the social jurisdiction. The laws being competent to every other object of good government, the constitution must have been exclusively designed for the case, to which it is now applied. Until a violation of the principles of the constitution appears, no occasion for resorting to the remedy exists; and when it does appear, to assert that there is no mode of getting at the remedy, or that the body presupposed by the violation, to be vitiated, are yet to enforce it upon themselves, is making the constitution a dead letter.

"Therefore if liberty is a national object, the nation itself must watch over the constitution, preserve it from violation, and supply its defects, or admit it to be the Lethe of the community, producing an entire forgetfulness of the rights of man.

"The national judgment or will may be brought to act in two modes, without recurring to a general convention.

"1. By cautiously electing members of Congress, of a similarity of interests—of burthens—of benefits—and of habits with the electors. For an unbiassed judgment upon good information, will correct political abuses, and invent new checks against their repetition.

"2. Through the organs of state legislatures.

"The first will operate slowly. The people may be deceived by professions, and a representative though sound at first is sometimes debauched. But yet as the people when informed, are almost invariably right, and as a representative is often firm, it deserves the most sedulous attention.

"The second is a security for liberty of the happiest texture which could have been devised.

"The state legislatures are the people themselves in a state of refinement, possessing superior information, and exhibiting the national suffrage in the fairest and safest mode.

"They are annual conventions, subject to no undue influence, not participating of loaves and fishes, and actuated by the motive of public good.

"Holding their power by an annual tenure, they are frequently accountable to the people, often changed, and incapable of forming combinations for their private emolument, at the public expense.

"Being more immediately within the view of their constituents, should they misinterpret the doings of the national government, or misrepresent the public mind, a detection, or a contradiction, would be almost instantaneous.

"As electors of senators, they constitute a chief link connecting the general and state governments, through which the conduct of the former may be better understood, and the will of the people reacted; so as to fill up in some measure, the great space between Congress and the people.

"They may operate decisively upon the general government, by constituting the senate according to a republican standard.

"And finally the state legislatures have at least as good a right to judge of every infraction of the constitution, as Congress itself." *

"It does not even save freedom of the press. This right has been assailed here by a sedition law, preparatory to the establishment of a supreme consolidated government, when it was attempted to force this country into the European alliance against the rights of the people, by a war with France." †

In moving the Resolutions themselves, Mr. Taylor

"began, by expressing great regret at the occasion which brought him forward. He conceived it to be an awful one. That Liberty was in danger, and . . . every effort should be made to repel attempts to subvert it . . . He said that oppression was the road to Civil War . . . the way to keep a Nation quiet, was to make it happy . . . In justification of which opinion, he stated that the people of the United States were at this time under the pressure of certain grievances. The way then to stop Civil War, would be to stop oppression.

* "Enquiry into the Principles and Tendency of Certain Public Measures," by John Taylor, of Caroline, pp. 53-55; 1794.

† John Taylor of Caroline, "New Views on the Constitution," p. 181; 1823.

But, said gentlemen, we must not disunite. To this he would answer, remove oppression, and union would take place." *

Mr. Nicholas, another confrere, speaking in the Virginia Ratifying Convention,

"contended that the language of the proposed ratification would secure every thing which gentlemen desired, as it declared that all powers vested in the Constitution were derived from the people, and might be resumed by them whensoever they should be perverted to their injury and oppression; and that every power not granted thereby remained at their will. No danger whatever could arise; for, says he, these expressions will become a part of the contract. The Constitution cannot be binding on Virginia, but with these conditions. If thirteen individuals are about to make a contract, and one agrees to it, but at the same time declares that he understands its meaning, signification, and intent, to be (what the words of the contract plainly and obviously denote), that it is not to be construed so as to impose any supplementary condition upon him, and that he is to be exonerated from it whensoever any such imposition shall be attempted,—I ask whether, in this case, these conditions, on which he has assented to it, would not be binding on the other twelve. In like manner these conditions will be binding on Congress. They can exercise no power that is not expressly granted them." †

Mr. Madison says:

"If it be asked, why a claim by a single party to the constitutional compact, to arrest a law, deemed by it a breach of the compact was not expressly guarded against, the simple answer is sufficient that a pretension so novel, so anomalous, so anarchical, was not and could not be anticipated."

But can it be reasonably supposed that to gentlemen holding such opinions as have just been cited—to Messrs. Taylor, Jefferson and Nicholas, this pretension would have seemed novel, anomalous and anarchical? It is difficult indeed to realise that

* Debates in House of Delegates of Virginia, December, 1798.

† Elliot's "Debates," Vol. III, pp. 625-626.

Mr. Madison himself should not at least have been upon his guard against such a construction, for not only had prior nullification of Federal laws been attempted or practised, "It is said that in several instances the authority & laws of the U. S. have been successfully nullified by the particular States. This may have occurred possibly in urgent cases, and in confidence that it would not be at variance with the construction of the Fedl. Govt. or in cases where, operating within the nullifying State alone it might be connived at as a lesser evil than a resort to force; or in cases not falling within the Fedl. jurisdiction; or finally, in cases, deemed by the States, subversive of their *essential rights*, and justified therefore, by the *natural* right of self-preservation. Be all this as it may," etc., etc., not only must such an idea have been familiar to others, as Mr. Madison acknowledges by pointing out the change made in the Resolutions, with, as he states, the object of averting such a construction, "In the 7th Resolution as originally proposed, the term *unconstitutional*, was followed by *null*, *void*, etc. These added words being considered by some as giving pretext for some disorganizing misconstruction, were unanimously stricken out."^{81H1} Again, in his Report on the Virginia Resolutions, he says :

"But a declaration, that proceedings of the Federal Government are not warranted by the Constitution, is a novelty neither among the citizens, nor among the Legislatures of the States; nor are the citizens or the Legislature of Virginia singular in the example of it." One might suppose from the tone of the Va. & Ky. Resolutions that their authors supposed them to be called forth by "an urgent occasion," etc.

Not only all this, but Mr. Madison was well aware, as were Messrs. Washington, Jefferson, and others, of the strong disunion sentiment existing in some (more particularly the Eastern) States. That he thought it a matter of importance cannot be doubted from his possession of Mr. Taylor's note on "Disunion Sentiment in Congress in 1794."

Mr. Gaillard Hunt, who edited this in 1905, says:

"The Manuscript memorandum herein reproduced in facsimile was written by John Taylor of Caroline, shortly after the conversation it records, and was given by him to James Madison. It was not included in the files of Madison's papers which he prepared for posterity and which the government bought, nor was it among those which Mr. J. C. McGuire collected; but was kept separate by him and after his death by his wife.

"Upon Mrs. Madison's death it fell into the hands of her nephew, the late James Madison Cutts, from whose widow it was recently purchased by the publishers of this work.

"This careful and close custody of the manuscript for so many years shows it was considered of the highest importance by Madison, and historical students will," etc.

Nay, even it may be said that, if Mr. Madison had remembered some of his ironical speeches and writings, in the Federal Convention and "Federalist" he might have remembered a time when such an opinion would not have seemed, to himself, so anarchical. At that time his ideas of the propriety of majority rule were distinctly qualified.

"Constitutional governments and the government of a majority, are utterly incompatible, it being the sole purpose of a constitution to impose limitations and checks upon the majority. An unchecked majority, is a despotism—and government is free, and will be permanent in proportion to the number, complexity and efficiency of the checks, by which its powers are controlled, . . . The lesson we are to draw from the whole is, that, where a majority are united by a common sentiment, and have an opportunity, the rights of the minor party become insecure. In a republican government, the majority, if united, have always an opportunity," etc.*

The remedy which he seems to have thought appropriate for this state of affairs may be found in "The Federalist," No. 46, *viz.*:

*Federal Convention, June 6, 1787.

"Were it admitted, however, that the federal government may feel an equal disposition with the state governments to extend its power beyond the due limits, the latter would still have the advantage in the means of defeating such encroachments. If an act of a particular state, though unfriendly to the national government, be generally popular in that state, and should not too grossly violate the oaths of the state officers, it is executed immediately, and of course, by means on the spot, and depending on the state alone. The opposition of the federal government, or the interposition of federal officers, would but inflame the zeal of all parties on the side of the state; and the evil could not be prevented or repaired, if at all, without the employment of means which must always be resorted to with reluctance and difficulty. On the other hand, should an unwarrantable measure of the federal government be unpopular in particular states, which would seldom fail to be the case, or even a warrantable measure be so, which may sometimes be the case, the means of opposition to it are powerful, and at hand. The disquietude of the people; their repugnance, and perhaps refusal, to co-operate with the officers of the union; the frowns of the executive magistracy of the state; the embarrassments created by legislative devices, which would often be added on such occasions, would oppose, in any state, difficulties not to be despised; would form, in a large state, very serious impediments; and where the sentiments of several adjoining states happened to be in unison, would present obstructions which the federal government would hardly be willing to encounter."

This certainly sounds very much more like state nullification than a "system that does not provide for a peaceable & authoritative termination of occurring controversies, would not be more than the shadow of a Govt.; the object & end of a real Govt. being the substitution of law & order for uncertainty confusion, & violence."

Mr. Madison states that had the Resolutions looked to separate action by the State of Virginia, it is fair to suppose that such an intention would have been the object of pointed an-

imadversion by the other States. But in the first place, it is doubtful if, at that period, there was a State which did not hold such a right to be within the intent of the Compact, however its exercise was to be deprecated; as indeed at various times thereabouts, and even considerably later, was asserted by divers of them. In addition, obvious reasons for touching lightly on such a matter existed. Therefore, it is against Mr. Madison's theory that so much animadversion of this intention remains evident. For it was taken notice of both in the replies of the States, and in the debates of the Virginia Legislature on the Resolutions; such understanding was apparently indicated by resolutions of the people of Virginia, and it was adverted to by the press and pamphlet criticism of other States.

Two of the States, at least, which replied to the Resolutions did so upon evident assumption that those Resolutions look to separate action by Virginia, and combat them by much the same arguments against their disruptive tendency as Mr. Madison employs (in defending them) against the South Carolina doctrine of nullification.

Massachusetts says :

"But, should the respectable state of Virginia persist in the assumption of the right to declare the acts of the National Government unconstitutional, and should she oppose successfully her force and will to those of the nation, the Constitution would be reduced to a mere cypher, to the form and pageantry of authority, without the energy of power. Every act of the Federal Government which thwarted the views or checked the ambitious projects of a particular state, or of its leading and influential members, would be the object of opposition and of remonstrance; while the people, convulsed and confused by the conflict between two hostile jurisdictions, enjoying the protection of neither, would be wearied into a submission to some bold leader, who would establish himself on the ruins of both."

Rhode Island "*Resolved*, That for any state legislature to assume that authority, would be . . . 2d. Hazarding an interruption of the peace of the states by civil discord, in case

of a diversity of opinions among the state legislatures; each state having, in that case, no resort for vindicating its own opinions, but to the strength of its own arm."

Mr. Madison says:

"The tenor of (the Debates) does not disclose any reference to a constitutional right in an individual state to arrest by force the operation of a law of the U. S."

They certainly referred to *a* right and intention to that effect, and, since Mr. Madison claims throughout that the Resolutions looked only to Constitutional action, it necessarily follows that the right referred to was looked upon as constitutional.

"IN THE HOUSE OF DELEGATES. Thursday, December 13, 1798.

"The House resolved itself into a Committee of the whole House, on the state of the Commonwealth, Mr. Breckenridge in the Chair, when the Resolutions presented to the House by Mr. John Taylor, and referred to the Committee, being taken up for its consideration.

"Mr. John Taylor began, by expressing great regret at the occasion which brought him forward. He conceived it to be an awful one. That Liberty was in danger, and as that rested on the foundation of responsibility, every effort should be made to repel attempts to subvert it. . . . Thence he concluded, that being thus situated, if the balance which the States ought to hold, should happen to be lost, the small Senate of the United States, might govern America. He further said, that although he had read in pamphlets and newspapers, and also had heard it reported, that such principles as he held, led to commotion, still he would assert that it was more likely to happen that a majority of small States might adopt measures which would oppress the rest, although they should contain the greatest number of citizens: and that the result of this would be a Civil War. The many would not submit to the few, and all history would show, that a majority armed with power, would never yield it without a struggle. He said that

oppression was the road to Civil War. To prove which, he asked what produced the war between Britain and America? Oppression. What produced the Revolution of France? Oppression. What produced the revolt of the United Provinces from Spain? Oppression. He said the way to keep a Nation quiet, was to make it happy: that oppression goaded it on to Civil War. In justification of which opinion, he stated that the people of the United States were at this time under the pressure of certain grievances. The way then to stop Civil War, would be to stop oppression. But, said gentlemen, we must not disunite. To this he would answer, remove oppression, and union would take place."

The arguments of the minority party in the Virginia Assembly in various places, give token that it professed at least to believe that the Resolutions intended separate action by the States; *e. g.*, the close of "Address of the Minority of the House of Delegates, Virginia," on Virginia Resolutions, states that, "continuing to confide in our government—continuing to regard union as the root of our political salvation," etc.

"Mr. George K. Taylor (the leader of the minority) arose, and said that he never felt himself impressed with more awe than on that occasion. The subject was of itself sufficiently momentous; but the Resolutions before them rendered it still more so. . . . By those Resolutions, as they then stood, the people were encouraged most openly to make resistance. . . . He then called the attention of the Committee to what had been the determination of the Legislatures of the other States. All which had taken these Laws under their consideration, had given them their decided approbation, either by way of Resolution, or Address to the President. It could not be denied but that they had some wisdom, and that it was not exclusively confined to the Legislature of Virginia. As the Legislatures then, of so many States, had concurred in the approbation of them, he thought it necessary for the Legislature of this State to hesitate in expressing its opinion of their unconstitutionality, especially when they reflected on the consequence attending it. For if these Laws were unconstitutional, the

Resolutions made it the duty of the people to defend themselves against them. . . . If the General Government then, possessed not the power of removal, one great mischief of a general nature, which it was intended to remedy, would remain as before. The Union would be dependent upon sixteen sovereign and jealous States, for carrying into effect such a measure. Some of these States too, might be on the verge of insurrection. . . .

"Mr. Pope arose next, and made several general observations in answer to those which had fallen from Mr. Geo. K. Taylor . . . The gentleman had also mentioned the determination of the other States. As well as he could recollect, he said, he conceived that such determinations extended only to an approbation of the measures of the Executive in regard to the negotiation with France. But be they what they would, we were not bound to follow their example. Kentucky had differed from them. He asked who had knocked at the doors of the Aristocratick Senate of the United States but Virginia? She had been the chief means of opening them. In that instance then, she had weight. He wished, therefore, that on this occasion they should do what they thought right. That too, might probably have weight. If it should not, they would at least discharge their duty. At any rate, he thought the determination according to the Resolutions which they were about to make, would not lead to war, as was apprehended; and therefore they might safely agree to pass them." *

"Mr. Barbour . . . then read the Resolutions and observed, the gentleman from Prince George had remarked, that those Resolutions invited the people to insurrection and to arms. But Mr. Barbour said, if he could conceive that the consequence foretold would grow out of the measure, he would become its bitterest enemy, for he deprecated intestine commotion, civil war and bloodshed, as the most direful evils which could befall a Country, except slavery. A resort to arms was the last appeal of an oppressed, an injured Nation, and was never made but when public servants converted themselves by usurpation into masters, and destroyed rights once

* Debates in House of Delegates, Dec. 15, 1798.

participated; and then, it was justifiable. But he observed, the idea of that same gentleman was in concert, as would appear by reference to a leading feature in the Resolutions, which was, their being addressed not to the people, but to the Sister States; praying in a pacific way their co-operation in arresting the tendency and effect of unconstitutional Laws. . . . It must follow then as an incontrovertible deduction, that the States are parties to the compact, and being parties, if the compact was violated (as it was violated) the States have the right and ought to exercise it, to declare that those proceedings, which are an infringement upon the Constitution, are not binding. The State Legislatures being the immediate Representatives of the people, and consequently the immediate guardians of their rights, should sound the tocsin of alarm at the approach of danger, and should be the arm of the people to repel every invasion. If, said he, the Alien and Sedition Laws are unconstitutional they are not Law, and of course of no force. . . . But before he went into that subject, it was necessary he should take notice of some miscellaneous remarks which had fallen from the gentleman from Prince George. That gentleman had observed that Congress had passed the Law, and that we should hesitate before we declared it unconstitutional; for if it was unconstitutional, the people ought to resort to arms. In answer to this, Mr. Barbour observed, that the circumstance of Congress having passed it, if it was intrinsically unconstitutional, did not render the Law less so. . . . He trusted, he said, that the American people were not prepared for unconditional submission and non-resistance. A doctrine like this would have disgraced the last century, and was fit only for the miserable regions of the east, where ignorance, superstition and despotism their sad dominion keep. He trusted that the American people did not intend to attach to servants the attribute of infallibility: if not, the adoption of the Law under discussion, by Congress, would have no weight upon the mind of the Committee. . . . The gentleman from Prince George was for the people's rising *en masse*, if the Law was unconstitutional. For his part, Mr. Barbour said, he was for using no violence. It was the peculiar blessing of the

American people to have redress within their reach, by Constitutional and peaceful means. He was for giving Congress an opportunity of repealing those obnoxious Laws complained of in the Resolutions; and thereby effacing from the American character a stain, which, if not soon wiped off, would become indelible. The gentleman from Prince George had further said, that all the other States in the Union had met and adjourned, and tacitly acquiesced in the measures which had been pursued by the General Government. The gentleman was incorrect in point of fact. The State of Kentucky had, in language as bold as could be used, expressed their execration of some of the leading measures of the General Government adopted at their last Session; but upon none more particularly than upon the Laws complained of in the Resolutions. The State of Tennessee was in such a situation, as to require or authorise the Governor to convene an extra Session. About what could it be, if it was not the uneasiness experienced by the people of that State at the usurpation of the General Government? In respect to the other States being not adverse, he would not contradict the gentleman. But what weight would this remark have upon the Committee? Was the conduct of the other States to be the criterion whereby to govern this State? He trusted not. He hoped, that so long as this State kept its independence, it would think and act for itself. Virginia had been always forward in repelling usurpation of every kind; and he trusted she never would forfeit the reputation she had acquired; but always would be the champion of the rights and liberties of America. . . . Mr. Barbour said, the Committee were told too of a conspiracy, which had for its object a schism in the empire, by which we were to lose the Western Country. Where was the evidence of that? Before he was willing to legislate, he said, he must have evidence of the fact, of a fact apparently so incredible, and so derogatory to the character of his Country. He believed the Western Country, particularly Kentucky, was inhabited by as virtuous and as patriotic characters as the World ever produced: men who possessed that genuine and fervent regard for the cause of Liberty that goes to elevate human nature a grade in the

scale of animated nature, from which they look down with ineffable disdain upon such calumnious charges as those." *

"Mr. Magill said, that he arose with sensations never before experienced by him; that he conceived the peace of the United States to be involved in the decision which the Committee were about to make; for the question appeared to him to be whether the States should remain united under the Federal Constitution, or that instrument which they were bound to support, be declared of no force or effect: that in delivering his sentiments to the Committee, he would address himself to the reason of the members, and avoid an appeal to their passions; for if the opinion he advocated could not be supported upon this ground, that he would not resort to any other. . . . The gentleman from Caroline had argued upon the condition upon which the Constitution was adopted in Virginia, and upon that point he had understood him to say, that the condition being broken, we were no longer bound by the ratification. This, Mr. Magill said, was an alarming doctrine. [Mr. Taylor had quoted from the ratification of the Constitution by Virginia to the effect that "we, the delegates of the people of Virginia . . . do, in the name and in behalf of the people of Virginia, declare and make known, that the powers granted under the Constitution, being derived from the people of the United States, may be resumed by them, whensoever the same shall be perverted to their injury or oppression; and that every power not granted thereby, remains with them, and at their will." Mr. Madison also quoted this ratification in his Report on the Resolutions.] . . . He said, the moment that the paper under consideration was adopted, he should consider as giving birth to a serious and alarming contest. He said, are we sincere in our professions of friendship to the Government of the United States? If so, why snatch with avidity an opportunity of resorting to a measure violent in its nature, before we have made an attempt, moderate and temperate." †

"Mr. Foushee arose next, and asked if it would be necessary for him to tell the Committee that the subject was *important*,

* Debates in House of Delegates, December 17, 1798.

† *Ibid.*, December 18, 1798.

after what the gentleman last up had said: 'that *peace* or *war* was to be the consequence.' And being so important, he (Mr. Foushee) thought, that they should most seriously consider the matter previous to a decision on the Resolutions before the Committee. He then made some remarks upon the quotations from the Law of Nations, used by Mr. George K. Taylor and Mr. Magill, to show that Sovereignty must reside in every Independent Nation, and the power consequently attached to Sovereignty. This doctrine he did not deny, but said, if the States individually were Sovereign before and at the time of the adoption of the Constitution, which he contended they then were, and still are, he asked could any one lay his finger on that part of the Constitution of the United States which had taken away their Sovereignty in those cases embraced by the Alien and Sedition Laws." *

"Mr. Brooke arose next, and said that he never could consent to sanction the passage of Resolutions having so alarming and dangerous a tendency as those which had been presented to them by the gentleman from Caroline; and before he gave his vote upon the subject, he would beg leave to state to the Committee, without adverting to the particular merits of the Laws that were the subject of those Resolutions, the reasons that would govern him in his vote upon that occasion.

"Resolutions such as these, said Mr. Brooke, declaring Laws which had been made by the Government of the United States to be unconstitutional, null and void, were in his opinion, in the highest extreme dangerous and improper, inasmuch as they had not only a tendency to inflame the public mind; they had not only a tendency to lessen that confidence that ought to subsist between the Representatives of the people in the General Government and their constituents, but they had a tendency to sap the very foundation of the Government, by producing resistance to its Laws, and were in the eyes of all foreign Nations evidence, fatal evidence, of internal discord in this Country, and of imbecility in our Government to protect itself against domestic violence and usurpation. . . . He should . . . before he sat down, beg leave to offer a Resolu-

* Debates in House of Delegates, December 18, 1798.

tion as a substitute for those which had been presented by the member from Caroline. He offered it, he said, at this stage of the business, because the tocsin of rebellion had been that day sounded in the House by the Resolutions accompanying the Governor's letter from the State of Kentucky. The sooner then, he said, our determination not to co-operate in resisting the Laws of the General Government should be announced to that State, the sooner our determination to support the American Government should be announced to the Nations of the Earth, the better." *

"General Lee then proceeded to the examination of the Alien and Sedition Laws. . . . He would himself cordially contribute his humble mite; but even in that case, he should adopt a very different manner from that contained in the Resolutions. Friendship should be the ground, friendship the dress, and friendship the end of his measures. The Resolutions inspired hostility, and squinted at disunion. . . . He would not, he said, examine the question of expediency of the Laws, but would examine the expediency of the Resolutions. Admitting for a moment that the Laws were unconstitutional, he contended that the course pursued by the Resolutions was inadmissible. Prudence frowned on the indecorum and hostility which their faces showed; nor was it to be presumed that contumely to the Sovereignty of the Union was the likeliest way to obtain a repeal of the Laws. The very reverse must happen. Why then recur to such an expedient, if the object of repeal be the real object? He hoped that he should be pardoned, he said, when he suspected that repeal of the Laws was not the leading point in view. Promotion of disunion and separation of the States, struck him as objects which the Resolutions covered. What evils so great could befall the American people? Every measure squinting at such disasters ought to be spurned with zeal. . . .

"The Resolutions, General Lee said, struck him as recommending resistance. They declared the Laws null and void. Our citizens thus thinking, would disobey the Laws. This disobedience would be patronised by the State, and could not

* Debates in House of Delegates.

be submitted to by the United States. Insurrection would be the consequence. We have had one insurrection lately, and that without the patronage of the Legislature. How much more likely might an insurrection happen, which seemed to be advised by the Assembly? The scene in Pennsylvania turned out to be a comedy: the same attempt here, he feared, would issue in tragedy. Let us, said he, avoid these numerous ills. All the States are interested in our decision, both as to their reputation and tranquillity. He requested gentlemen then to be temperate, to reject the proffered paper, and adopt some other course." *

"Mr. John Taylor arose next, and observed, that though it was late, and the debates had been protracted to great length, he hoped the importance of the subject would be considered as a justification for his replying to the extraordinary and dangerous arguments which had been urged in opposition to the Resolutions he had introduced.

"A member of Lunenburg had even asserted them to be an act of perfidiousness to the people; because, by undertaking to declare one Law of Congress unconstitutional, the Legislature would assume a power of declaring all their Laws unconstitutional. Let the proposition then be reversed, to discover if there be perfidiousness in the case, the side to which it attached. Would it be said, that the Legislature could not declare this Law of Congress unconstitutional, because it could declare no Law of Congress unconstitutional? Admitting such a position, did not these consequences evidently follow, that the check mediated against Congress in the existence of the State Governments, was demolished. That Congress might at its pleasure violate the Constitutional rights of these Governments. That they must instantly become dependent, and be finally annihilated. Could it be perfidious to preserve the freedom of Religion, of Speech, of the Press, and even the right of petitioning for a redress of grievances? Gentlemen, in defining the Laws of Congress, had taken their stand upon this broad principle, namely, 'That every Government inherently possesses the powers necessary for its own preservation.'

* Debates in House of Delegates, December 20, 1798.

Apply this principle to the State Governments: for, if it be a sound one, they are equally entitled to the benefit of it, with the General Government. Under this principle then, to which his adversary had resorted, and which he therefore could not deny, it followed that the State Governments have a right to withstand such unconstitutional Laws of Congress, as may tend to their destruction, because such 'a power is necessary for their preservation.' To illustrate this, suppose Congress should be of opinion, that an arrangement of men into different ranks would tend to the order of society, and should, as preparatory to this end, intermeddle with inheritances, and re-establish primogeniture. It could be only urged against such a Law, that it was unconstitutional; but if the State could not declare any Law of Congress unconstitutional and void, even such an one as this must be submitted to, and of course all powers whatsoever would gradually be absorbed by, and consolidated in, the General Government.

"He observed, that the right of the State to contest the Constitutionality of a Law of Congress could however be defended upon better ground, than by the re-action of the doctrines of gentlemen on themselves. That a principle literally Constitutional, theoretically sound, and practically useful, could be advanced, on which to rest it. It was this: the people and the States could only have intended to invest Congress with a power to legislate Constitutionally, and the Constitution expressly retains to the people and the States, every power not surrendered. If therefore Congress should, as was certainly possible, legislate unconstitutionally, it was evident that in theory they have done wrong, and it only remained to consider whether the Constitution is so defective as to have established limitations and reservations, without the means of enforcing them, in a mode, by which they could be made practically useful. Suppose a clashing of opinion should exist between Congress and the States, respecting the true limits of their Constitutional territories, it was easy to see, that if the right of decision had been vested in either party, that party, deciding in the spirit and interest of party, would inevitably have swallowed up the other. The Constitution must not only

have foreseen the possibility of such a clashing, but also the consequence of a preference on either side as to its construction. And out of this foresight must have arisen the fifth Article, by which two-thirds of Congress may call upon the States for an explanation of any such controversy as the present, by way of Amendment to the Constitution; and thus correct an erroneous construction of its own acts, by a minority of the States; whilst two-thirds of the States are also allowed to compel Congress to call a Convention, in case so many should think an Amendment necessary for the purpose of checking the unconstitutional acts of that body. Thus, so far as Congress may have the power, it might exert it to check the usurpations of a State, and so far as the States may possess it, an union of two-thirds in one opinion might effectually check the usurpations of Congress. And, under this Article of the Constitution, the incontrovertible principle before stated, might become practically useful; otherwise no remedy did exist for the only case which could possibly destroy the Constitution, namely, an encroachment by Congress, or the States, upon the rights of the other. The case was even strongest in favor of a check in the hands of the States upon Congress; for although Congress could never alter or amend the Constitution, without the concurrence of three-fourths of the States; yet such a concurrence would be able so to alter or amend it, as to check the encroachments of Congress, although the whole of that body should disagree thereto. The reason for this will exhibit the unconstitutionality of the argument, which supposes, that the States hold their Constitutional rights by the courtesy of Congress. It was this: Congress is the creature of the States and of the people; but neither the States nor the people are the creatures of Congress. It would be evidently absurd, that the creature should exclusively construe the instrument of its own existence; and therefore this construction was reversed indiscriminately to one or the other of those powers, of which Congress was the joint work; namely, to the people, whenever a Convention was resorted to, or to the States, whenever the operation should be carried on by three fourths.

“Mr. Taylor then proceeded to apply these observations to

the threats of war, and the apprehension of civil commotion, towards which the Resolutions were said to have a tendency: Are the Republicans, said he, possessed of fleets and armies? If not, to what could they appeal for defence and support? To nothing, except public opinion. If that should be against them, they must yield; if for them, did gentlemen mean to say, that public will should be assailed by force? If so, should a minority, by the help of the powers of Government, resort to force for its defence against public opinion; and against a State which was pursuing the only possible and ordinary mode of ascertaining the opinion of two-thirds of the States, by declaring its own and asking theirs? How could the fifth Article of the Constitution be brought into practical use, even upon the most flagrant usurpations? War or insurrection therefore, could not happen, except Congress should attempt to controul public opinion by force; and this it could not be supposed they would ever do, not only because the will of the people is the Sovereign in all Republics; but also, because both that will and the will of the States, were made the Constitutional referee in the case under consideration. Hence a movement towards this referee could never be admitted as leading to war or commotion, except in those Countries where an armed and corrupt minority had usurped the Government, and would of course behold with abhorrence an arbitrament of a majority. Such however he hoped would be the respect to public opinion, that he doubted not but that the two reprobated Laws would be sacrificed, to quiet the apprehensions even of a single State, without the necessity of a Convention, or a mandate from three fourths of the States, whenever it shall be admitted, that the quiet and happiness of the people is the true end and design of Government. . . .

“He observed, that the Resolutions had been objected to as being couched in language too strong and offensive, whilst it had also been said on the same side, that if the Laws were unconstitutional, the people ought to fly to arms, and resist them. To this, he replied, that he was not surprised to hear the enemies of the Resolutions recommending measures which were either feeble or rash. Timidity, it was known, only

served to invite a repetition of injury, whilst an unconstitutional resort to arms, would not only justly exasperate all good men, but invite those who differed from the friends to the Resolutions, to the same appeal, and produce a Civil War. Hence those who wished to preserve the peace, as well as the Constitution, had rejected both alternatives, and chosen the middle way. They had uttered what they conceived to be truth, in firm yet decent language; and they had pursued a system which was only an appeal to public opinion, because that appeal was warranted by the Constitution, and by principle; and because it gave an opportunity to the General Government to discover whether they would be faithful to the same principle, and thereby establish a precedent, which would both now and hereafter have a strong tendency against Civil War. That this firmness, which was both exhibited and felt, was really necessary as an act of friendship to the General Government, if it was true, as some thought, and as the commotion in the public mind plainly indicated, that a farther progress in their system was full of danger to itself, and misery to the people. . . .

"That firmness as well as moderation could only produce a desirable coincidence between the States, an example of which having been already set by Kentucky, it behoved us so to act as to avoid a difference of opinion as to the mode, when we united in the end; because divisions respecting either, would undoubtedly destroy every hope of a successful issue. In opposition to the propriety of soliciting this coincidence, the Constitution, prohibiting the States from entering into a confederation among themselves, had been quoted. In reply to which, he would ask, if an application from one State to another to learn its sentiments upon a point relative to the Constitution, was to be considered unconstitutional, as amounting to a confederation? In what way could two thirds of the States consult or unite, so as to exercise their right of calling a Convention under the fifth Article, or in what way could three fourths ever amend the Constitution? This observation evinced the incorrectness of such a construction, as had also the practice of the States, in submitting each other's Resolu-

tions to mutual consideration, in a variety of instances. . . .

"Mr. Taylor concluded with observing, that the will of the people was better expressed through organized bodies dependent on that will, than by tumultuous meetings; that thus the preservation of peace and good order would be more secure; that the States, however, were clearly parties to the Constitution, as political bodies; that rights were reserved to them, which reservation included a power of preservation; that the Legislature of the State was under a double obligation to oppose infractions of the Constitution, as servants of the people, and also as the guardian of those rights of Sovereignty, and that qualified independence reserved to the State Governments by the Constitution; and to act up to this duty, was the only possible mode of sustaining the fabric of American policy, according to the principles prescribed by the American Constitution." *

"Mr. George K. Taylor arose and said . . . On the Sedition Law, . . . he would make no further remarks, but would proceed to other parts of the Resolutions.

"The seventh Resolution is in the words following: 'That the good people of this Commonwealth having ever felt and continuing to feel the most sincere affection to their brethren of the other States, the truest anxiety for establishing and perpetuating the union of all, and the most scrupulous fidelity to that Constitution which is the pledge of mutual friendship and the instrument of mutual happiness; the General Assembly doth solemnly appeal to the like dispositions of the other States, in confidence that they will concur with this Commonwealth in declaring, as it does hereby declare that the Acts aforesaid are *unconstitutional and not Law, but utterly null, void, and of no effect*, and that the necessary and proper measures will be taken by each for *co-operating* with this State in maintaining unimpaired the authorities, rights and liberties reserved to the States respectively, or to the people.'

"On this Resolution, Mr. Taylor said, two remarks would be submitted. The Legislature of one State in the Union, declare two Acts passed by a majority of the Representatives

* Debates in House of Delegates, December 20, 1798.

of the whole American people, to be *unconstitutional, and not Law, but utterly null, void, and of no effect*. They declare this, not as an *opinion*, but as a certain and incontrovertible fact; in consequence of which the people of the State owe no submission to the Laws. Have, continued he, the Representatives of a *part*, a power thus to controul and to defeat the acts of the *whole*? In the Congress of the United States, the people of each State are fairly and equally represented in proportion to the population of that State. If, after a majority in that Congress have decided that certain Laws are Constitutional and expedient, the Legislature of Virginia hath a right to annul those Laws by declaring them to be unconstitutional, the old Republican maxim that the majority must govern, was exploded, and the Union would be dissolved. If the State of Virginia could repeal and annul the Alien and Sedition Laws, she could repeal and annul any other Acts of Congress; and if *she* hath the right, every other State must possess it likewise.

“If any Act passed by Congress be unconstitutional, the Judges of the Federal Court, who are unbiassed by party, and unwarped by prejudice, and who are selected for their superior talents and integrity, afforded a Constitutional check upon the Legislature. The people themselves are another most powerful check; for they will know the vote of their Representatives, and if they deem the Law for which they voted to be unconstitutional, they will order them to depart at the ensuing election, and re-place them with others more wise and more virtuous. Here were two peaceable and happy modes of correcting the mischief: whereas, for one or more jealous State Legislatures to endeavor to repel or controul the Acts of Congress by their Sovereign power, was at once to introduce disunion and civil war. The Government of the Union, which might have yielded to fair reason and argument, will never give way to the threats or force of these rival Sovereignties. If they do, the powers and energies of the Federal Government would be from that moment destroyed. They will determine to try the experiment whether the Union shall govern a few States, or a few States shall rule the Union. The certain consequence will

be a resort to arms, civil war and carnage, and a probable dismemberment of the Union. . . . ^{31H2}

"These Resolutions, continued Mr. Taylor, must have some ultimate object; and it had been demanded what that object was? The gentleman from Caroline had answered that it was ultimately to induce the States to call another General Convention for the Amendment of the Constitution. How unfortunate and ruinous such an experiment would be, the reflection of a few minutes must convince us. . . .

"In Virginia, Mr. Taylor said, the general sentiment was that the Government of the United States verges towards, and will ultimately settle in a Monarchy. But the measures of that Government are supported by a majority of the House of Representatives, and by a still greater majority of the Senate. From this obvious proof of the prevailing sentiment throughout the Union, was it to be expected that another Government would be framed vesting smaller or fewer powers in the Executive than he at present exercises? Would not our object on the contrary be defeated, since the General Convention would probably enlarge instead of diminish the powers of the National Government? No other consequence therefore could at the present time, and under existing circumstances, follow such an experiment, but increase of dissatisfaction and disgust, and a more ardent disposition to dis sever the bonds of union which now connect all America.

"In such a Convention in vain should we reckon on the superior importance, power and influence of Virginia: A majority of States would never agree to summon another Convention unless it should be previously agreed and declared that the votes shall be taken as in the former Convention, by *States*. In such a Convention, where the influence of Delaware or Rhode Island would be as great, and their respective votes would weigh as much as those of Virginia and Pennsylvania, what would be our chance of carrying our particular objects into effect? The smaller States already behold us with jealousy and apprehension. Each representative would come prepared to watch, to oppose and circumvent every other. Northern and Southern, Eastern and Western parties and interests

would immediately appear; and the Convention, after a restless and turbulent session, which would increase instead of diminish the rage of faction among their constituents, would rise in confusion. The sound of peace would be no longer heard; the sentiment of union would no longer continue; but the sword would be drawn, the Union forever dismembered, and the bloody history of Europe would be retraced in the melancholy annals of divided and hostile America." *

"Mr. Giles arose next and said . . . He then referred to our situation, and said, that he felt himself as much interested as any one to ward off war: but he thought the worst of all things was untimely submission: and that a Constitutional violation was more degrading than any thing. . . . Mr. Giles made some further observations on the last clause of the Law last mentioned, and then said, that declaring these Acts of Congress unconstitutional, satisfied the oaths of the members of this Assembly. He would agree to stop after that, if they thought proper, and to strike out everything beyond it. If gentlemen thought the Laws were unconstitutional, they were bound to say so; otherwise, it would be a dereliction of the oath which they had taken. For his part, he said, he should vote for something which would express his opinion upon the subject. He would, however, at any rate, move to strike out of the Resolutions before the Committee, the word *alone*.

"Mr. Nicholas seconded Mr. Giles's motion for striking out of the Resolutions the word *alone*; and further observed, that either the gentleman from Prince George or himself, misunderstood the gentleman from Caroline in respect to calling a Convention. He hoped therefore, that the gentleman from Caroline would explain himself upon that point. Mr. Nicholas then stated what he understood that gentleman to say, which he himself approved; but on the contrary did not approve the calling a Convention.

"Mr. Bolling said, that he understood the gentleman from Caroline in the same manner that the gentleman who was last up did, in respect to calling a Convention. Mr. Bolling also

* Debates in House of Delegates, December 21, 1798.

made several observations to show that the gentleman from Prince George had misunderstood Mr. Jefferson's letter which had been quoted by him.

"Mr. John Taylor said he would explain in a few words what he had before said. That the plan proposed by the Resolutions would not eventuate in war, but might in a Convention. He did not admit, or contemplate, that a Convention would be called. He only said, that if Congress, upon being addressed to have those Laws repealed, should persist, they might by a concurrence of three fourths of the States, be compelled to call a Convention. Mr. Taylor further said, that while up he would himself move to strike out certain words of the Resolutions, if the same were in order; which being agreed to without a question taken, Mr. Taylor proceeded to do so.

"The original Resolutions offered by him to the House, and referred to the Committee of the whole House on the state of the Commonwealth, were in the following words:

"*Resolved*, as the opinion of this Committee, that the General Assembly of Virginia doth unequivocally express a firm resolution to maintain and defend the Constitution of the United States, and the Constitution of this State, against every aggression either foreign or domestic, and that they will support the Government of the United States in all measures warranted by the former.

"That this Assembly most solemnly declares a warm attachment to the union of the States, to maintain which it pledges all its powers; and that for this end it is their duty to watch over and oppose every infraction of those principles, which constitute the only basis of that union, because a faithful observance of them can alone secure its existence, and the public happiness.

"That this Assembly doth explicitly and peremptorily declare that it views the powers of the Federal Government as resulting from the compact, to which the States *alone* are parties; as limited by the plain sense and intention of the instrument constituting that compact; as no further valid than they are authorised by the grants enumerated in that compact; and

that in case of a deliberate, palpable and dangerous exercise of other powers not granted by the said compact, the States, who are parties thereto, have the right, and are in duty bound, to interpose for arresting the progress of the evil, and for maintaining within their respective limits, the authorities, rights and liberties appertaining to them. That the General Assembly doth also express its deep regret that a spirit has in sundry instances been manifested by the Federal Government, to enlarge its powers by forced constructions of the Constitutional Charter which defines them; and that indications have appeared of a design to expound certain general phrases (which having been copied from the very limited grant of powers in the former Articles of Confederation, were the less liable to be misconstrued), so as to destroy the meaning and effect of the particular enumeration, which necessarily explains and limits the general phrases, and so as to consolidate the States by degrees into one Sovereignty, the obvious tendency and inevitable result of which would be to transform the present Republican system of the United States into an absolute, or at best a mixed Monarchy.

"That the General Assembly doth particularly protest against the palpable and alarming infractions of the Constitution, in the two late cases of the 'Alien and Sedition Acts,' passed at the last Session of Congress, the first of which exercises a power nowhere delegated to the Federal Government; and which by uniting Legislative and Judicial powers to those of Executive, subverts the general principles of free government, as well as the particular organization and positive provisions of the Federal Constitution: and the other of which Acts exercises in like manner a power not delegated by the Constitution, but on the contrary expressly and positively forbidden by one of the Amendments thereto; a power which more than any other ought to produce universal alarm, because it is levelled against that right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right.

"That this State having by its Convention which ratified the

Federal Constitution, expressly declared, 'that among other essential rights, the liberty of Conscience and of the Press cannot be cancelled, abridged, restrained or modified by any authority of the United States,' and from its extreme anxiety to guard these rights from every possible attack of sophistry or ambition, having with other States recommended an Amendment for that purpose, which Amendment was in due time annexed to the Constitution, it would mark a reproachful inconsistency and criminal degeneracy, if an indifference were now shown to the most palpable violation of one of the rights thus declared and secured, and to the establishment of a precedent which may be fatal to the other.

"That the good people of this Commonwealth having ever felt, and continuing to feel the most sincere affection to their brethren of the other States, the truest anxiety for establishing and perpetuating the union of all, and the most scrupulous fidelity to that Constitution which is the pledge of mutual friendship, and the instrument of mutual happiness, the General Assembly doth solemnly appeal to the like dispositions of the other States, in confidence that they will concur with this Commonwealth in declaring, as it does hereby declare, that the Acts aforesaid are unconstitutional, *and not Law, but utterly null, void, and of no force or effect*, and that the necessary and proper measures will be taken by each, for co-operating with this State in maintaining unimpaired the authorities, rights and liberties reserved to the States respectively, or to the people.

"That the Governor be desired to transmit a copy of the foregoing Resolutions to the Executive authority of each of the other States, with a request that the same may be communicated to the Legislature thereof.

"And that a copy be furnished to each of the Senators and Representatives, representing this State in the Congress of the United States.

"The word '*alone*' in the third clause, and the '*and not Law, but utterly null, void, and of no force or effect*,' in the seventh clause, were stricken out of the foregoing Resolutions.

"Mr. John Taylor's Resolutions thus amended, being then

read by the Chairman, Mr. Brooke moved to amend the same, by substituting in lieu thereof the Resolution which he had offered to the Committee on Tuesday, the 18th instant, and which was then laid upon the table. The question was put thereupon, and the Amendment disagreed to by the Committee. The main question was then put on Mr. John Taylor's Resolutions as amended by himself, and agreed to.

"The Committee then rose, and Mr. Breckenridge reported, that the Committee of the whole House on the state of the Commonwealth had had the same under their consideration, and had come to certain Resolutions thereupon, which he handed in to the Clerk's table (being Mr. John Taylor's Resolutions, as above stated, amended and agreed to by the Committee)." *

It will thus be seen that while, *to some extent*, Mr. Madison's contention that the Resolutions were intended as an appeal to concurrent action by the States was corroborated by the statements of two or three of their defenders,—*e. g.*, Mr. Taylor himself,—on the other hand they were widely attacked as supposing individual action by Virginia: and that this supposition seems sufficiently well founded in the bellicose tone of their defenders, as for example, of Mr. Taylor.

It was widely believed, at the time and later, that Virginia was prepared to support its doctrine by arms; although, as in the case of the New England States during the War of 1812, but more completely, her acts at this period have been veiled in mystery. But what has transpired is not in consonance with the aspect under which Mr. Madison's later remembrance presents them.

"In Virginia, the Republican party were ever active, and many circumstances now concurred to draw into its ranks the learning, the talent, and much of the patriotism of the state. Some of the earliest supporters of the Constitution saw with regret that this sacred instrument was in danger of being made subservient to purposes fatal to freedom. Taking advantage of certain general expressions and clauses in the eighth section

* Debates in the House of Delegates, December 21, 1798.

of the first article, Congress had exercised powers which by no sound exegesis, could be claimed, and the President had approved. There was a virulence of feeling entertained towards the chief magistrate of the country, which was much to be deplored; but he had, unhappily, given some occasion for it by words used in his published letters, in which he had expressed preference for aristocracy, and had spoken of a 'faction' in Virginia which ought to be 'ground into dust and ashes.' His leading measures were regarded with alarm, and though good in themselves, they were then considered as part of a system destructive of the independence of the states. He increased the 'standing army,' gave it compactness, and earnestly sought to organize its officers and men; he expanded the policy of Washington as to the navy; built sloops, corvettes, frigates, and made strong this arm of national power.

"(1798.) When all the causes operating upon the public mind in Virginia are weighed, we may be prepared to understand the course she pursued in the memorable events of '98 and '99. The first measure she adopted is one around which a cloud of mystery has been thrown that is not dispelled by contemporary records. But the ominous silence observed at the time will, in itself, furnish evidence tending to solve the mystery. On the 23d of January the Legislature, after a preamble studiously brief, enacted a law greatly extending the means for state defence. Two arsenals were to be provided in addition to that already existing at the Point of Fork. An armory was to be speedily built at Richmond, and vigorous means were to be used for the manufacture of arms. The building was itself to be large enough for storing in safety ten thousand stand of muskets; and pistols, holsters, and swords were to be prepared for troops of cavalry. No delay occurred in carrying out these provisions. The building arose, which has ever since excited the interest of visitors to the metropolis of the Old Dominion. Artificers were soon at work, and the result of their labours has been apparent.

"Sixty thousand muskets have been committed to the hands of the state militia, or else are retained in condition to make them serviceable at short notice. Two hundred and twelve

pieces of cannon are ranged around the upper and lower platform of the armory yard, most of them are of small calibre, but some are very heavy. With them, have been placed six beautiful brass siege-pieces, and two mortars, concerning which a singular obscurity prevails in our records. The opinion best sustained is that they were landed from a French ship of war during the siege of Yorktown, and that they were a gift from the sovereign of France to the 'unterrified commonwealth.'

"Why this warlike preparation, these bright bayonets, this formidable array of cannon? We will not pretend to answer by referring to the printed witnesses of the times; they are cautious, more than cautious,—they are silent. But, in subsequent years, gray-haired citizens have had the seal taken from their lips, and have told us that surrounding events had much to do with this war spirit. And her own instructions soon afterwards delivered to her senators and delegates in Congress, will show how much the state apprehended from the standing army, the growing navy, the gradual advances of the General Government. Had she been compelled to fight for her sovereignty, Virginia would have been prepared." *

"Mr. Jackson, of Virginia, rose in explanation on a point which had been incidentally introduced into debate. . . . He should not have risen, however, but to put to rights a statement which he understood to have been made on another point, and to which the gentleman from Massachusetts had just referred; that about the years 1799-1800, the armory authorized to be built by the State of Virginia was intended to manufacture arms for the purpose of opposing the constituted authorities of the nation. Sir, I appeal to your recollection, (addressing Mr. Breckenridge, Chairman of the Committee,) for we were then in the Legislature of Virginia together, whether the fact was so— . . .

"Mr. Randolph asked the opportunity to make an explanation on the subject . . . I said I did; that I could not conceive any case in which the people could not be intrusted with arms;

* Howison, "History of Virginia," Vol. II, pp. 346-349.

and that the use of them, to oppose oppressive measures, was in principle the same, whether those of the Administration of Lord North, or that of Mr. Adams; that administration, the object of which I had no doubt then, and I have none now, was to change the Constitution of the United States in fact, as it is now changed in substance. If it had continued to persevere in that course of conduct which had given just alarm to the wisest and best men in this country, and particularly in Virginia, Mr. R. said, he had no doubt it would have terminated in an appeal to arms; and it would have done so on the principles of the Revolution of 1688, and of the Revolution of 1776, neither one nor the other of which took place on any other principle than resistance of the encroachments of Government on the rights of the people. At that time, and subsequent to it, Mr. R. said, he understood the temper of the Virginia Legislature (without meaning to say better) as well as the gentleman who had just sat down. My declaration was, said Mr. R., that the armory was erected to furnish the people with arms to resist Federal usurpation, provided the Federal Administration had continued in that career of oppression which it had commenced. Those were his words, which, he said, had been somehow cut off from the main body of his declaration. But he hoped he was not understood to say, that, though in time of peace the State of Virginia was prepared to assert the rights of that ancient and venerable Commonwealth, which after having hoisted the flag that braved the battle and the breeze; the flag that braved Lord North, was not going to succumb to John Adams—which had been then, and now was, as ready to resist the encroachments of this Government, as she was or ever had been to resist the Parliament and Ministry of Great Britain; he hoped he was not understood to intimate that he or that State was disposed to turn the extreme medicine of the Constitution into the ordinary diet . . . No, he never did mean to say, that, under those circumstances, the State of Virginia would pitch upon that time to array herself against the general Government. No, he said, she would fight out the war, and settle the quarrel afterwards. Her uniform policy showed that that was the

course which she would in such circumstances pursue. With respect to an honorable assembly, which had been spoken of in this House and out of it—the Hartford Convention—as opposed to the Richmond bayonets, he meant to be on the side, not only of the bayonet, but of the Richmond bayonets. Bring that question ever before him, as an individual member of this House, or as a man, and he would take the Richmond bayonets, to use a sporting phrase, against the Hartford Convention.

“Mr. R. said he meant not to deny the right of any State in the Union, Rhode Island, if you will, to assert its rights against the General Government, any more than the right of the people of Virginia to assert their rights against their Government. . . . I do say now, said Mr. R., that if the Federal Administration did not halt in its career of usurpation of the liberties of the people, and the Constitution of the country, the State of Virginia was disposed to stand on the bank of the Potomac, and defend that parchment against the bayonets of those who were willing to burn that parchment at the point of the bayonet. But it was not combustible; the conspirators against New Orleans, from above, succeeded no better than its assailants from below; instead of burning the parchment, sir, they burnt their own fingers.

“Mr. Jackson said, he was glad of the explanation the gentleman had given. I am myself, said he, one of the last men in the nation, who would quote what comes from newspapers, because misrepresentations occur in them—often accidental, sometimes intentional. But, in our domicile, this day, the gentleman from Massachusetts, reciting what I understood as the account of my colleague’s declaration, asked me whether Virginia did not build an arsenal for the purpose of manufacturing arms, expressly to oppose the constituted authorities of the country; from which, I understood him to convey the idea that such was the statement that had been made on this floor.

“Mr. Randolph explained. He did believe that nothing but the awfulness of the times had induced a majority of the Virginia Assembly, at that period, to have launched into so expensive an undertaking as the establishment of the armory.

The fair and alleged use of that institution was to arm the militia. Who could object to it? Who would say that free-men had not a right to arm against John Adams and his provisional army, *fruges consumere nati*, provided they had gone on in their course of usurpation? When he had made the remarks referred to, it was on an amendment, to the Constitution, going still further to narrow the limits of State rights, &c.

“Mr. Jackson said, having a distinct recollection of the circumstances of the case, he should proceed with his statement. In the year 1798, said Mr. J., General Wood was the Governor of Virginia, who had been a general officer during the Revolutionary war, but always was, during his life—though standing high in the confidence of the Republican party—an unequivocal Federalist, in the usual acceptation of the term. During his administration, the Legislature authorized the purchase of arms. About that time, Mr. J. said, that he (quite a boy) had been elected to the Legislature, and then first took sides; for, anterior to that time, with the exception of a few distinguished men in Congress, and with the exception of the British Treaty question, the people were not divided into parties. The Governor had contracted with Swann, of Boston, who had delivered at Richmond 4,000 stand of arms, at \$13 each—the whole costing \$52,000 annually. These arms had been found worthless, on trial, having been purchased in Europe, the refuse of armories and shops there, on speculation. The Legislature, in consequence of that state of the fact, and desiring to provide arms for the State—a measure which had always been a subject of anxiety with General Washington, without reference to the state of the times; if any such views were entertained, Mr. J. said, he was not let into them—had enacted a law authorizing the establishment of an arsenal at Richmond, in order to get good arms instead of bad. In the next year, (1800) Mr. Monroe succeeded to the Chair of the State government. Party division was at its crisis. The ferment eventuated in the adoption, by the Legislature of Virginia, of the general ticket system, and Mr. Jefferson succeeded to the Presidency. The armory had been, ever since that day, in operation; and Mr. J. said he never had, until

he had heard the suggestion on this floor this morning, (referring to what his colleague had said on a former occasion, in the absence of Mr. J.,) heard a single individual intimate a disposition to oppose with arms the constituted authority of the Government. John Taylor, of Caroline, was a popular man, at the head of the Democratic party, in the Virginia Legislature, in the year 1798. But if he or any other of the friends of the armory had any such intention as had been referred to, they had concealed it from the majority; and it had not, to the knowledge of Mr. J., been avowed by any person.* As proof of the disposition of Virginia to acquiesce in the execution of the laws, however oppressive, of the General Government, and to resist them only by the Constitutional means of election, Mr. J. said he might refer to the fact, that during that period, the sedition law had been carried into execution in the Capitol of the State. True it was that Callender had traduced the Founder of the Liberties and the Father of his Country, but his demerit did not change the character of the sedition law; and the same temper of respect for the law would, in all human probability, have existed, if the punishment of the sedition law had been inflicted on the first man of the State, instead of the vilest miscreant.

"Mr. Randolph apologized for troubling the House again, which he should not have done, had not his name been brought into question by two gentlemen on this occasion. He saw now before him, he said, a son of one of those men, to whom he could on all occasions have appealed, who never minced his declarations—never stopped short of the extent to which he was willing to go—never looked one way and rowed another. The times, he said, had been awful at the period referred to. It was certainly true that John Taylor, of Caroline, (a name which would live when many, if not all, of this Assembly were forgotten,) was the father of that armory, which—not meaning to impeach the statement of the gentleman over the way (Mr. Jackson)—was built, not so much because of the badness of the arms, as because it was proper for the State of Virginia to keep in her possession the means of arming the mi-

* Evidently Mr. Jackson had not heard the debates on the Resolutions.

litia, rather than depend for her supply on contracts which the United States might stop. The persons who were active in the establishment of that Armory were long-headed and clear-sighted men. Mr. R. said, he was afraid some of the arms since made by the armory were not much better than those supplied by Swann—but that, by the way. . . .

“Mr. Pleasants, of Virginia, said, if he recollected the statement of his colleague on a former occasion, which had been referred to to-day, it was something like this: that it was now pretty clearly ascertained that the armory established on the banks of James river was intended to oppose the administration of John Adams, if it went on in its mad career. Mr. P. said he did not know how the fact had been ascertained. It was a certain fact, that the men who had the principal agency in the establishment of that armory, had most unequivocally disavowed that intention. I was then, said Mr. P., a young man, ardent and zealous in the cause which I then thought, and now think, the right cause. I put more confidence then in the gentleman to whom I refer, than I would now do in any man. I was a member of the Legislature in 1797—the first year an appropriation for arms was made—and in the four following successive years. I perfectly well recollect, in the discussion of the resolutions which made so much noise then, and have since been frequently referred to, John Taylor of Caroline was expressly charged by General Henry Lee, then a member of the House of Delegates, with intending to bring on these measures and the armory, &c., together, and that the armory was in reality intended to oppose the Federal Government; that, whatever other color might be put upon it, this was the object. I never shall forget Mr. Taylor’s reply, when, as I understood, in direct allusion to General Lee’s situation, his former occupation, and supposed circumstances, contrasted with his own situation, he turned to General Lee, and asked whether *he* was the man who might be expected to seek redress for present evils in a civil war? Were his circumstances so desperate, he asked; was *he* the great military leader who was likely to desire civil commotion, &c.? . . .

“Mr. R[andolph] said that the only favor he asked at any

man's hands who had quoted him on that floor, was to use his very words, and to take them altogether. . . . What had he said? . . . 'That by throwing (as she had an undoubted right to do) her whole weight into the electoral scale, the Commonwealth of Virginia had constitutionally effected a change of ministry, and checked the mad career of ambition and usurpation, which otherwise she might have been compelled to resist, at the hazard of the greatest of all calamities, the abject surrender of their rights excepted, that a people could endure—of a civil war—for there was no longer any cause for concealing the fact, that the grand armory at Richmond was built to enable the State of Virginia to resist, by force, the encroachments of the then Administration upon her indisputable rights—upon the plainest and clearest provisions of the Constitution—in case they should persevere in those outrageous proceedings?' And why had he so said? Because the principles and the men of that day, such excepted whose practice belied their then professions, had been laid aside, and new principles, more convenient for men in power, and new men—men, whose names, at that time, and long since, had never been pronounced out of their own parish, had come into play. . . .

"Mr. R. asked if there was no case in which his colleague could justify resistance against the encroachments of Government upon the privileges of the people or the rights of the States? The question was, like every other question touching human affairs, to be governed by a sound discretion. The Assembly displayed that discretion; they acted under a high responsibility, with a dignity and firmness which had long characterized and he trusted would ever govern the proceedings of that ancient and venerable Commonwealth. They had sagacity to perceive the approaching danger, and wisdom and courage to make timely provision against it. They did not content themselves with resolutions and reports. They were statesmen, not professors in an university. They knew that logic was no match for the bayonet, and they provided bayonets; at the same time taking care to put themselves in the right by a most unanswerable and triumphant appeal to ac-

knowledge facts, and to the great charter of the Confederacy. And, sir, said Mr. R., did Virginia stand alone, in this fearful, this impending conflict of authority, between the parent State governments and this bloated, pampered, overweening Federal Government—this creature of concession from the States, now spurning its creator in the intoxication of power? No, sir, the eldest daughter of Virginia, the eldest sister of the younger branch of this great political family, took the lead even of her venerable parent. John Taylor, of Caroline, had publicly announced, under his hand, that the resolutions of the preceding session of Assembly, moved by him and ascribed to his pen, were drawn by the present President of the United States, then in retirement at his seat in the county of Orange. Sir, (said Mr. R. to the chairman, Mr. Breckenridge,) I did not stand as you did in the relation of consanguinity to the mover of the Kentucky resolutions, but I was in habits of political intimacy with him, and I assert, without fear of contradiction, that the resolutions moved and carried in the Legislature of Kentucky, on that memorable occasion, sprung from that same vein of rich red land between the Rapidan and James rivers, which has proved so favorable to the Presidential growth. . . .

“Mr. R. again adverted to the state of things in 1798 and 1800. He said that the opposition of that time was guilty of the grossest hypocrisy, if it was not alarmed at the standing army, small as it was to what we had since seen with approbation. For his part, he felt the apprehension which he had not scrupled to express. He should never forget the declaration of one of the ministerial leaders, the first session that he (Mr. R.) served in that House, that the standing army (upon a motion to reduce it) was necessary to keep the partisans of France in check. Another leader, second in activity and in reputation for influence to none, ventured to hint, not in public indeed, at a partition of Virginia by the Blue Ridge, or by James river, or both. The cry was that Virginia was overgrown; that she was unmanageable, (yes, she was unmanageable, thank God!) that if the country south of James River could be detached from the rest of the State, ‘the friends of

government, of order,' that was the language, might cope successfully with the 'anarchists,' and the south side of James river would not be powerful enough to give much trouble to Administration. Hardly (said Mr. R.) were the designs of the Federal Government concealed. The partition of Poland was decreed, but Poland had turned upon and discomfited the partitioners. Mr. R. appealed to public rumor at the time, and declared that he had the fact of a design to partition Virginia, and the alleged reasons for it, from his lamented predecessor in that House, (Mr. Venable). Gentlemen talked of 'admissions' and 'confessions.' He had made none—he had none to make—he had no apologies to offer—Virginia stood on her defense—the knife was at her throat—she was to be humbled in dust and ashes, and if she had not resisted, would have richly deserved the chains that were forging for her. Was the contested election, which almost immediately ensued between Mr. Jefferson and Mr. Burr forgotten? We did not then rely upon the Richmond armory, not yet in operation, but on the United States armory at Harper's Ferry. At that day, when the Constitution itself was put to hazard, rather than relinquish the long enjoyed sweets of power; when the sun rose upon this House, balloting through the night and through successive days for a Chief Magistrate—(he well remembered the scene)—had we not the promise of Dark's brigade, and of the arms at Harper's Ferry, which he engaged to secure in case of an attempt to set up a pageant under color of law to supersede the public will, after defeating the election by the pertinacious abuse, under the pretence of exercise of Constitutional right, to support one of the persons returned by artifice, whom they professed to abhor. General Hamilton had frowned indignantly upon this unworthy procedure, for which he paid the forfeit of his life. The conduct of this great man—for such, although Mr. R. differed with him in many points, he truly was—first opened his eyes to his much abused character. At this period of approaching confusion and general dismay, the President elect—then Governor of Virginia—had deemed it advisable to establish a line of videttes from Richmond to this place. One of his colleagues, then present,

(Mr. Sheffey,) could tell something about these videttes, having made the expense a subject of inquiry at a subsequent session of the Legislature. Every appearance betokened the breaking up of the Federal compact, when the opponents of the public will, constitutionally pronounced, tardily and ungraciously gave up their opposition, and Mr. Jefferson was installed. . . .” *

Both contemporary comment, and the tone of the memorials of various Virginia Counties, etc., lend weight to the belief that Virginia was prepared, and believed by other States so to be, to go to extremity in defense of her announced principles.

“It is stated in addition that the opposition party in Virginia, the head-quarters of the faction, have followed up the hostile declarations which are to be found in the resolutions of their General Assembly by an actual preparation of the means of supporting them by force, that they have taken measures to put their militia on a more efficient footing—are preparing considerable arsenals and magazines, and (which is an unequivocal proof how much they are in earnest) have gone so far as to lay new taxes on their citizens. Amidst such serious indications of hostility, the safety and the duty of the supporters of the government call upon them to adopt vigorous measures of counteraction. It will be wise in them to act upon the hypothesis that the opposers of the government are resolved, if it shall be practicable, to make its existence a question of force. Possessing, as they now do, all the constitutional powers, it will be an unpardonable mistake on their part if they do not exert them to surround the Constitution with more ramparts and to disconcert the schemes of its enemies.” †

“It will be said, that if this constitution shall be destroyed, we can peaceably make a new one. Let this assertion be considered. It was with extreme difficulty, that so many of the thirteen states (then existing) were persuaded to adopt the Federal Constitution, as were necessary to set it in motion . . .

* Annals of the 14th Congress, Second Session, January 30-31, 1817.

† Alexander Hamilton, Letter to Jonathan Dayton, 1799.

Never has there been a period, since the Constitution first began to operate, when the States could have been induced to adopt it, had it been necessary . . . The present Constitution, says Mr. Jefferson, (and of course all the Jacobins) is a Monarchy. Will Virginia live under such a monarchy? Would she adopt one if it were now offered to her? . . . If a new government were to be formed by *compact*, it must be one," etc.*

"The United States form two great divisions of territory—North and South. Tho' generally of the same origin, tho' they speak the same language, fought for the same Independence, and are members of the same nation, there are still in some respects great differences between them. The Southern states are unhappily encumbered with a vast multitude of slaves. Slaves are the tools with which Jacobinism delights to work . . . They will begin the work of slaughter, lay waste the fair fields of our southern brethren . . . To avoid sharing in all these calamities, and perhaps with a hope of saving their government the Northern states will probably be disposed to separate the union. This tho' an evil of mighty magnitude is less, far less, than anarchy or slavery." †

"Fruits of French Diplomatic Skill.

"The *apparent* Diplomatic train of the French Government in this country, though numerous beyond all precedent or plea of necessity, has composed but a small part of her active and direct agency here. Volney, Lachaise, and a hundred other spies have been unremittingly engaged in preparing the remote and unorganized parts of this country for a revolt from the Union, etc. The revolt has at length been bro't about in the state of Kentucky.

"One Garrard who seems to be Governor of the State, appears to have been the first mover in this ambitious project. In his speech to the Legislature he tells them, they have a right to censure the general government. . . . This abominable speech . . . produced forthwith the following daring resolu-

* "Burleigh," *Connecticut Courant*, September 29, 1800.

† *Ibid.*, September 22, 1800.

tion, viz., 'That the several states composing the United States of America, are not united on the principle,' etc." *

"The ruling majority of the people of Virginia, under their oligarchical constitution, had . . . been wrought up into a sort of creed that the liberties of the people of the Union were in danger inexpressible from the exercise of power by the general government; and as there was infinite alarm that power devoted to and resulting in the improvement of the country, would take root in the affections of the people, and become irresistible, the party opposed to the general government seized upon every prejudice and passion and interest . . . to cripple the operations of this beneficent power . . . The lurking jealousies of slave-holders were enlisted against the native of a State wholly free. The bone-bred dislikes of the cavalier race to the scion from the state of the Pilgrim Puritans were summoned to the array against him," etc.†

The tone of the County Meetings of Virginia, show their understanding and support of the Resolutions as an assertion of the rights of their State; *e. g.*:

"TAPPAHANOE, ESSEX COUNTY,
November, 19, 1798.

"At a meeting of the people of Essex county this day, . . . the following memorial intended as instructions to John Dangerfield, and James Webb, esqr's. delegates from the said county, and to Benjamin Temple, esqr. senator from the district of which the said county is a part, was presented. . . . "To the General Assembly of the state of Virginia, the Memorial of the People of Essex county greeting:—

"Your memorialists availing themselves of their constitutional, and unalienable right to assemble, deliberate, and decide upon all subjects of the general and local concern, deem it expedient to apply to your body, for your assistance in obtaining a redress of their grievances. Whenever a law is passed by the constituted authorities, which does not transcend their pow-

* *Connecticut Courant*, September, 1800.

† John Q. Adams, "Appeal to the Citizens of the U. S.," Henry Adams's "New England Federation," p. 140; B., 1877.

ers, your memorialists conceive it to be their duty to submit to its operation, however oppressive it may be, until the general voice of the nation shall concur in requiring its repeal. But when laws are made contrary, both to the spirit and letter of the constitution, your memorialists are of opinion, that such laws encroach on the sovereignty of the people, and are in their nature void, that the authority which enacts such laws is self-created, and unconstitutional, and that every attempt to execute them is tyranny.

"Your memorialists are of opinion, that a revolution is a dreadful evil; revolutions are effected by fire and sword; revolutions sacrifice upon the altar of revenge, thousands of innocent, virtuous, and useful victims. But revolutions are the result of some powerful cause. This cause is OPPRESSION. The history of the world sufficiently shews, that oppression does not at once, openly and boldly erect its hideous front; it is by gradual encroachments on the liberty of a people that they become slaves. It is under the veil of specious pretexts, that those scenes are acted, which make (in the end) the many to cater for the appetites of the few, instead of making the few attend to the welfare of the many. Such encroachments ought, in the opinion of your memorialists, to be opposed with firmness from the beginning, not only on account of their present effects, but of their future consequences, but they think that every expedient ought to be adopted before a recourse is had to revolutionary principles.—Under a conviction of these truths, your memorialists beg leave to call your attention to some of the late acts of Congress, particularly the alien and sedition laws, which to them are peculiarly obnoxious, and which strike at the foundation of our frame of government." *

"That the laws passed at the last session of the Congress of the United States called the alien and sedition bills are . . .

"That if solemn oaths and constitutional principles are to yield to the doctrine of Legislative expediency, all human means for the security of liberty are lost." †

* "Aurora," Philadelphia, December 7, 1798.

† Memorial of Freeholders of Caroline Co., Journal of House of Delegates of Virginia, December 8, 1798.

"At a very numerous and respectable meeting of the inhabitants of the county of Spottsylvania . . .

2. *Resolved*, as the opinion of this meeting, that the constitution of the United States contains a limitation of power, to be exercised in the form and manner therein prescribed; and never can authorise the use of any powers but what are expressly enumerated in it—that the people of America, in framing their own constitution, intended to establish a confederation, and not a consolidated government; and therefore wisely prescribed limits to the authorities constituted under it, beyond which they cannot go in the just exercise of their legitimate powers—that the constitution itself having declared, 'The powers not delegated to the United States, by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people'—any assumption of authority that transcends this limitation, is an invasion of the rights and sovereignty of the states, and an usurpation of power, that can produce no act of any binding force. . . .

"7. *Resolved*, as the opinion of this meeting, that the people have a right to resume into their own hands, all delegated power, when it shall have been used by their agents in a manner destructive of the ends for which it was delegated; or to remonstrate against such acts of their legislatures as may be unconstitutional, oppressive, or unjust—that, being attached to the existence of the Union upon these principles, which made us one people, by all the ties that can interest the hearts, and engage the affections of men, we shall prefer the means best calculated to preserve that Union, and therefore do request the chairman of this meeting . . ." *

The press of other States reflects a similar understanding; *e. g.*:

"The Test of Federalism!

"In the State of Massachusetts.

"It should be recorded in every public Gazette, that, at a time when our right rights were invaded, and our liberties threatened, by the diabolical policy of licentious Frenchmen

* "Aurora," November 20, 1798.

—the Legislature of Virginia, intoxicate with French politics, passed certain Resolutions tending to subvert the General Government, which, being forwarded to the Legislature of Massachusetts, for the purpose of carrying them into effect the said Legislature of Massachusetts, actuated by a desire to preserve the American Union, and impressed with its vast importance, made the subsequent REPORT thereon—Let it be preserved in the archives of Federalism, with the names of those worthy men who sanctioned it. [Here follows the reply of Mass. before quoted].” *

“The late Virginia and Kentucky resolutions are quite in point, and these two weak and infatuated States observe the same language as their leader in their seditious proceedings, for as he calls the destruction of the constitution, “liberty”—they, like foolish ostriches hiding their heads and supposing themselves unseen, declare that they *hold the union sacred*, both evincing the eternal and necessary character of insurrection and rebellion, respect for what they are stretching forth their sacrilegious hands to destroy.—The pride and vain glory of the human heart, under the auspices, and probably from the very inspiration of Mr. Jefferson, caught like a boy with the tinsel glare of now desolated France, appear ready to act the low and vulgar part of mistaking shadows for substances, upon the ground of a prior and more dangerous error, as they will find it—that of mistaking substances for shadows.” †

“But whatever is the true germ of it, there is an irreconcilable antipathy in the *Ancient dominion* against the eastern states. Virginia will *govern all* or *govern herself*.—It may be that the federal constitution has a peculiar ill effect upon the people of Virginia, but if that is the case, the reason is that Virginia has made laws to repel the obligations of the British treaty, which now by the constitution has become one of the supreme laws of the land. All the other States in the Union except Kentucky submit, as they ought to the general government. But Virginia, terribly in debt to England, and haughty and vain-glorious in character, finding that the *good*

* “The Test of Federalism,” in “Jenks Gazette,” Feb. 25, 1799.

† Massachusetts “Jenks Gazette,” March 4, 1799.

of the whole union is inconsistent with her particular interest (honesty out of the question) has for years opposed the federal government within and as a member of it. Finding this to be vain, and that not only the British treaty would stand, France and Virginia notwithstanding but that Mr. Adams could be made President and kept so too, France and Virginia notwithstanding, she has been obliged to throw off the mask and actually rebel against the United States. I shall not mince matters—I say, TO REBEL against the United States. For what less than rebellion is it to annul within her territory the sedition law by empowering her judiciary to reverse the convictions of the circuit court?—She would not so plainly and contemptuously deny the authority of Congress by going to war, as by asserting her own sovereignty in opposition to that of the Union in a point essential to the existence of the latter, and fairly ceded by the constitution.” *

“For the Mercury.

“Observations occasioned by reading Addresses from several Legislatures to the President—and the Speeches of, and answers to, many of the State Governors.

“One is amazed at the assurance of the opposers of our Government, when they affect to be Republicans. The Grand Fundamental principal of Republicanism is, that the majority shall govern, any thing contrary to this is *Despotism*. As to the Chiefs of opposition they are wilful traitors to the principles they profess—Though they have the hearts of brutes—they have heads with some furniture. Their unparalleled impudence, and excessive baseness renders them indifferent to their errors and absurdities. But how can the supposed well meaning dupes of these designers, remain in despicable thralldom, after the most abundant and impressive proof of the folly and wickedness of their Principals?—If the *Minority* is to *rule* are we not instantly thrown on the brink of a tremendous precipice? What is Despotism, but the *rule* of the *Minority*? What Aristocracy, Hierarchy, &c., &c., but the same? All oppressive Governments result from the superiority of a *few* over the *many*. Can any one doubt that the Majority is

* “The Test of Federalism,” in *Jenks Gazette*, Feb. 25, 1799.

on the side of the *Administration*? If it is possible—and he is anxious to be right, let him look at the Federal Senate and House. The Constitution declares that a *major* vote shall decide—all decisions, then, are the consequences of such *major* vote—even the Sedition Act. Let him look at the approbation of this *majority*, by a *majority* of the people in re-electing those who composed it—Or others of the same sentiment—Let him look in every State Legislature in the Union, the immediate organ of the People—and he will find in every one of them a *Majority* of friends to the Administration—in some there is the most perfect *unanimity*? If scepticism does not yet surrender, as it ought, he may be convinced by negative evidence—he may cast his eyes at Prince Edward County, Virginia—there he will find a few *slave holders consistently* insinuating that our government is *tyrannical*! The whole *County* has but about one quarter part of the number of inhabitants which the town of *Boston* contains! Let him read the fulminating Memorial of *sundry* inhabitants of *Caroline County* in *Virginia*—also dealers in human flesh—and know that the whole *County* has but about 7000 white inhabitants.—Then he may glance at the citizens of *Kentucky* and *Tennessee*, as remote from Republicanism and intelligence, as they are from the sea coast. In short let him look every way and hearken to every whisper of Jacobinism. Yet we are confident, the result will demonstrate, that as the population of the *United States* is to the inhabitants of the world, so is (*sic*) the Jacobins in the *United States*, to the Federalists.” *

“Providence, March 9. On Wednesday a salute was fired in honor of the *Constellation*’s Victory, and the bells were merrily rang. In the evening the Coffee House was illuminated, a transparent representation of a frigate, and the name *Truxton*, was exhibited.

“The General Assembly of this State, which met at East Greenwich on the 25th ult., adjourned on Saturday last.

“During the session, certain resolutions of the Legislature of Kentucky, communicated by the Executive of that State to

* Mass. “Mercury,” Tuesday, Dec. 18, 1798.

ours, being under consideration, the following resolves were passed, viz. :

“Resolved, That in the opinion of this Legislature, the second section of the third article of the Constitution of the United States, in these words, to wit:—*The judicial power shall extend to all cases arising under the laws of the United States*, vests in the Federal Courts, exclusively, and in the Supreme Court of the United States, ultimately, the authority of deciding on the constitutionality of any act or law of the Congress of the United States.

“Resolved, That for any State Legislature to assume that authority, would be,

“1st. Blending together legislative and judicial powers.

“2d. Hazarding an interruption of the peace of the States by civil discord, in case of a diversity of opinions among the State Legislatures, each State having in case no resort for vindicating its own opinion, but to the strength of its own arm.

“3d. Submitting most important questions of law, to less competent tribunals, and

“4th. An infraction of the Constitution of the United States, expressed in plain terms,” etc.*

From all this it seems evident that the meaning of the Virginia and Kentucky Resolutions, if correctly given in the thirties by Mr. Madison, was sadly misunderstood by their contemporaries; and that far from being taken as a call to concurrent state action, they were understood as a declaration of the right of individual state action.

“The Legislature of Virginia having ordered certain resolutions . . . The resolutions . . . if not intended, were well calculated as a declaration of war by the state of Virginia against the government of the United States. . . . It appearing then that the people of the several states are the parties to the compact in the constitution, it will not follow that, because the *parties* to a compact must be the judges whether it has been violated, the *Legislatures* of each state are the judges whether the constitution has been violated. Yet this is

* Massachusetts *Mercury*, March 12, 1799.

the position maintained by the resolution. It seems clear, that the reasoning in the resolution does not support it; and I know no reasoning that can support it. To give the reasoning in the report its full force, it amounts to this and to this only. The people of the several states in their sovereign capacity are parties to the compact in the constitution; every party to a compact may judge of its violation; the people of Virginia in their sovereign capacity, are a party to this compact; therefore the people of Virginia, in their sovereign capacity, may judge of its violation. It is manifest that this reasoning will not support the resolution; for it claims a right of the Legislature of Virginia to judge of the violation of the compact. To support the resolution the reasoning ought to be thus. The Legislature of Virginia is a party to the compact; every party to a compact has a right to judge of its violation; therefore the Legislature of Virginia has a right to judge of its violation. . . . The resolutions conclude as they commenced, with a profession of affection . . . and anxiety for the Union. I will not say (for they profess otherwise) that the object of the resolution is to dissolve the Union; but I may with little hazard of contradiction say, that they are (especially accompanied with the report) well calculated for this purpose." *

The author of this "Analysis" was a distinguished lawyer and judge. As the extract is quoted for the purpose only of showing his understanding that the Resolutions referred to separate action by Virginia, it is unnecessary here to go into the point raised by him.

Considering now Mr. Madison's explanation of the Resolutions, certain serious difficulties become obvious. He himself alludes to one of these as follows:

"It has been said that (by) the right of interposition asserted for the states by the proceedings of Virginia could not be meant a right for them in their collective character of parties to and creators of the Constitution, because that was a

* "Analysis of the Report of the Committee of the Virginia Assembly on the proceedings of sundry of the other States in answer to their Resolutions," by Alexander Addison; Phila., 1800.

right by none denied. But as a simple truth or truism, its assertion might not be out of place when applied as in the resolution, especially in an avowed recurrence to fundamental principles, as in duty called for by the occasion. What is a portion of the Declaration of Independence but a series of simple and undeniable truths or truisms? what but the same composed a great part of the Declaration of Rights prefixed to the state constitutions?" *

The explanation fails to satisfy; the illustration darkens council. If Messrs. Brown, Jones & Robinson, meeting individually in solemn conclave, passed resolutions that Brown, Jones & Robinson (as a firm) was unjustified in its business methods, that they were all going to stop such carryings on, and Bill Smith, the office-boy, had no right to interfere, that would be one kind of truism. To the contrary, if Brown, only, notified Jones and Robinson, that *he* had a right to a say in the business; that he did not like the way Bill Smith was allowed to run things, and that the firm must mend its manners, or he would withdraw from partnership, as he had the right to do, that might also be a truism in the eyes of some people: at least there is no difficulty at all in understanding why he should do it, and what it meant.

What were the statements of the Declaration of Independence or Declarations of Rights that at the time of their assertion were truisms? Mr. Madison says they were truisms. But certainly in the eyes of some people, the majority and main ones were far from such. The divine right of kings and the doctrine of non-resistance would equally, at that time, have seemed truisms to quite as many.

It is indeed expressly their novelty that is most emphasized by philosophical political thinkers.† The bloodiest revolution in history was fought twenty years after their annunciation because they were not then truisms in Europe, but wildly subversive theories. And it may be safely added that there is not

* "Notes on Nullification," 1835.

† Cf. Appendix 48, Acton and Taylor; also Professor Sumner, Preface.

one of those "truisms" which is not to-day in some degree, denied in practice by the laws and manners (not merely of Germany, Russia, etc.) of these United States. But a statement that he who has the power to do a thing *can* do it; and that Messrs. Brown, Jones & Robinson, if all of them will it, can make Bill Smith act politely to Brown and the customers, or get another boy who will, is a truism of a very different nature,—one recognized instantly by all, in all circumstances, as unnecessary of assertion. Mr. Madison's own statement recognizes this over and again: "The fallacy which draws a different conclusion . . . lies in confounding a *single* party with the *parties* to the Constitutional compact of the United States. The latter having made the compact may do what they will with it."

"However deficient a remedial right in a *single State* might be to preserve the Constn. against usurped power an ultimate and adequate remedy wd. always exist in the rights of the *parties* to the Constn. in whose hands the Constn. is at all times but clay in the hands of the potter, and who could apply a remedy of explaing. amendg., or remakg. it, as the one or the other mode might be the most proper remedy," etc., etc.

And this, Mr. Madison asserted, was all that the Virginia and Kentucky Resolutions amounted to. *Parturiunt montes!*

Not only did that Declaration and those Bills of Rights to which he alluded, declare the right of the States (*i. e.*, of their people) to change or abolish governments, State and Federal, at their will: but the Federal government was, and is, but the agent,—the "Bill Smith" of Messrs. Brown, Jones & Robinson,—of *all* the States. It has no breath but from their lungs; it has no force but of their lending; it has no money but of their payment; it dies instantly if they all wish it. It is a created thing, a "Feathertop," to wither at their frown,—if they *all* frown. Not a member of the Virginia Legislature, friendly or unfriendly to the Resolutions, but knew not only that the concurrence of *all* the States was unnecessary to turn the Supreme Court into a magistrate's court, or do away with it altogether, but also knew, that in accordance with undisputed terms

of the Constitution, functions claimed by that Court had been removed from its purview, shortly after the Constitution went into operation: the assent of two-thirds only of the States being necessary. Why then should they have used language which gave rise to such misconception of their purpose? Why when that misconception was made evident in the arguments of the opponents of the Resolutions, etc., were they not refuted by an appeal to this, not truism, but written, undenied, already acted upon, Constitutional provision? The thing is almost incredible.

And if the matter is considered not as hard facts and common sense, but from the viewpoint of what may be called metaphysical politics,—from Mr. Madison's doctrine of sovereignty,—his case is not perceived to be strengthened. He says :

"The States, then being the parties to the compact, and in their sovereign capacity, it follows of necessity, that there can be no tribunal above their authority, to decide in the last resort, whether the compact made by them be violated," etc.

The statement, as referring not to the respective States, but to all the States, as a unit, seems meaningless. As so stated, what bearing has "and in their sovereign capacity" on the result deduced? It is a meaningless phrase, according to Mr. Madison's own principles, as applied to the States as a unit. It must be because they entered the Union as sovereign States (a matter which he says is only a matter of "historical curiosity, having no bearing on the matter") ; it must be because they retain that sovereignty,—else what meaning has it? Yet this he denies both explicitly and by the principles he contends for. Its only force is as referring to separate and respective action, and consequently the results to be deduced from it apply to that action; *i. e.*, the results of their entering the compact as sovereigns, are results applying not to all, but to each respectively. If they have the right as a unit, it can only be because each possesses it in severalty. And, "recurring to fundamental principles," *of what practical use would be the statement of the right of a party to a bargain to annul that bargain, if it*

was understood that such a right could only be exercised in concurrence with the other parties to the bargain—the parties committing the infraction complained of?

Mr. Madison's contention involves a logical dilemma, the way out of which is not perceived.

According to him the dispute was "between the Government and the constituent body, Virginia making an appeal to the latter against the assumption of power by the former."

But, according to Mr. Madison, the States were the parties to the compact. Not the States with the Federal Government, but the States with each other. When parties to a bargain reserve rights, etc., against whom do they reserve them if not against the other parties? Who can violate a bargain excepting parties to it? If all the parties to a bargain assert the same thing, no protest is necessary. It is because their interests are different, and that all will not concur, that stipulations and reserves are necessary. The Federal government, as such, was as destitute of power as of right to encroach on the States. As Mr. Grayson said, in the Virginia Ratifying Convention, its only energy came from a faction of the States.

What did Mr. Hamilton mean,—at least, to what understanding of his words did he appeal,—when he wrote these words?

"It is therefore improbable, that there should exist a disposition in the federal councils, to usurp the powers with which they are connected. But let it be admitted, for argument sake, there mere wantonness, and lust of domination, would be sufficient to beget that disposition; still it may be safely affirmed, that the sense of the people *of the several states* would controul the indulgence of so extravagant an appetite." *

"But what can be more consistent with common sense than that all having the same rights &c., should unite in contending for the security of each," says Mr. Madison.

Is it the veteran statesman who took so large a share in the compromises and dickering rendered necessary by the separate interests, jealousies and precautions of the separate states,—

* "The Federalist." Italicized by B. S.

in the compromises of the Constitution, in the debates of the Ratifying Convention of his own State, who framed the Resolutions and Report of '98, who speaks of the miracle of the Constitution having been accepted by the States,—who writes this? Confront it with the speech of Mr. J. Taylor, beginning this Appendix.

APPENDIX 31H¹

(II Page 214)

It would appear that the expunging from the Resolutions the words “null and void” was of slight importance; “(Mr. Daniel) said, he was fearful that he had already trespassed upon the patience of the Committee, and he would hasten to a conclusion, with a few remarks on the particular shape and address of the Resolutions. It had been objected by gentlemen, that it was going too far to declare the Acts in question, to be ‘no Law, null, void, and of no effect:’ that it was sufficient to say they were unconstitutional. He said, if they were unconstitutional, it followed necessarily that they were ‘not law, but null, void, and of no effect.’ But, if those particular words were offensive to gentlemen, he had no objection to any modification; so the principles were retained.”

APPENDIX 31H²

(II Page 233)

It seems undeniable that these remarks of Mr. Taylor point to a weak spot in Mr. Madison’s claim that Virginia’s Resolutions looked only to concurrent action by all the States. One does not usually begin negotiations, looking to conciliation, in the unmistakably defiant and positive tone of those Resolutions.

APPENDIX 32

(I Page 90)

“THE radical vice of this whole theory [*i. e.*, nullification and secession] was that it assumed the cession of political powers of legislation and government, made by the people of a State when they ratified the Constitution of the United States, to be revocable, not by a State power or right expressly contained in the instrument, but by a right resulting from *the assumed* nature of the Constitution as a compact between sovereign States. The Secession Ordinance of South Carolina, adopted on the 20th of December, 1860, which became the model of all the other similar ordinances, exhibits in a striking manner the character of the theory. It professed to ‘repeal’ the ordinance of the State which in 1788 had ratified the Constitution of the United States, and all the subsequent acts of the legislature which had ratified the amendments of that Constitution, and to dissolve the union then subsisting between South Carolina and other States under the name of the ‘United States of America.’ In other words, the people of South Carolina, assembled in convention, determined that a cession or grant of political sovereignty, which they had made to the Government of the United States in 1788, *in an irrevocable form, and without any reservation save of the powers of government which they did not grant*, could yet be revoked and annulled, not by the right of revolution, but by a right resulting as a constitutional principle from a compact made between sovereign and independent political communities. This method of regarding the Government of the United States as the depository of certain powers to be held and exercised so long as the sovereign parties to the agreement should see fit to allow them to remain, and to be withdrawn whenever one of the parties should determine to withdraw them, constituted the whole basis of the doctrine of secession. *If the premises were correct, the deduction was sound.* If, on the other hand, the cession of certain powers of political sovereignty made by the

people of a State when they ratified the Constitution of the United States constituted a Government, with a right to rule over the individual inhabitants of that State, *in the exercise of the powers conceded*, the individual inhabitants could no more absolve themselves collectively, than they could separately, from the political duty and obligation to obey the laws and submit to the authority of Government,^{32A} *especially when that Government contained within itself, by one of the provisions of its Constitution, both the means and the right of determining for the people of every State, whether the laws enacted by Congress were in conformity with the grants of political power embraced in the instrument which created it. The grant of the judicial power of the United States estopped the people of every State from claiming a right to pass upon the constitutional validity of any exercise of its legislative or executive authority.*" *

Mr. Curtis's statement of the case is exceptionable. It assumes as proven, disputed facts, which are at the foundation of the question. It is so stated that its meaning is obscure. Certain passages are underlined for comment. 1st, What does Mr. Curtis precisely mean by the "*assumed* nature of the Constitution as a compact between sovereign States?" If he means that the nature of the Constitution was assumed to be a compact between sovereign States, we believe that the "assumption" has been fully proven. If he means that the nature of the deduction to be drawn from "a compact between sovereign States" was "assumed," we believe it to have been shown that it was so assumed in accordance with the law of nations, by the makers of the Constitution. Indeed Mr. Curtis seems himself to admit this, by stating that "if the premises were correct, the deduction was sound." He can scarcely mean that "If a cession or grant of political sovereignty . . . could be revoked" by a right resulting from a compact, etc., then "the deduction was correct" that it could be revoked. But if he means to draw into issue the fact of the compact as the premise, then that, as has been said, is, we believe, established, and "the deduction" is "sound." So also if he

* George T. Curtis, "Life of Buchanan," Vol. II, p. 316; N. Y., 1883.

means to draw into issue whether the compact being assumed, the deduction would follow; that, too, we believe, has been established.

2d, The assertion that "the people of South Carolina" (or any other State) "granted to the Government of the United States *in an irrevocable form*," etc., ANY "grant of political sovereignty" is, firstly, it would seem, not germane to the point. For, if the grant was in the nature of compact of sovereign states (and it has been shown so to be), it was subject to the laws governing such compacts, without "a right expressly contained in the instrument." Moreover, it is certainly not a matter which should be thus boldly asserted by a jurist such as Judge Curtis, as a positive fact.^{32B} 3d, But if the statement is in accordance with facts, that "The cession of certain powers of political sovereignty made by the people of a State when they ratified the Constitution of the United States constituted a Government, with a right to rule over the individual inhabitants of that State, in the exercise of the powers conceded, the individual inhabitants could no more absolve themselves collectively, than they could separately, from the political duty and obligation to obey the laws and submit to the authority of Government," is correct, then Mr. Curtis seems wrong in saying that this was "especially" so "when that Government contained within itself, by one of the provisions of its Constitution, both the means and the right of determining for the people of every State, whether the laws enacted by Congress were in conformity with the grants of political power embraced in the instrument which created it. The grant of the judicial power of the United States estopped the people of every State from claiming a right to pass upon the constitutional validity of any exercise of its legislative or executive authority." If the first statement is correct, the second adds nothing to its strength.

But granting the opposite position, *viz.*: of the compact-between-States theory, then indeed this statement becomes of the first importance. Whether a jurist, such as Judge Curtis, is justified in his positive assertion is discussed in Appendix 31G.

According to Mr. Curtis, the grant of political sovereignty by the people of the States made "reservation of the powers of government which they (*i. e.*, the people) did not grant." Therefore the power of judging what those powers were, failing "a provision of the Constitution (to provide a tribunal for judging) whether the laws enacted by Congress were in conformity with the grants of political power embraced in the instrument which ceded it," must have remained either with the grantor of those powers (*i. e.*, "the States, or the people thereof"), or have been in some extra-Constitutional way acquired by the grantee. The cession of certain powers of political sovereignty made by the people of a State when they ratified the Constitution of the United States constituted a government with a right to rule over the individual inhabitants of that State in the exercise of the *powers conceded* only; failing an appointed tribunal, who is to be judge as to the powers *conceded*?

We thus see the importance of the doctrine which Mr. Curtis has found it advisable to add, (with Mr. Madison) that

"That government contained within itself, by one of the provisions of its Constitution, both the means and the right of determining for the people of every State, whether the laws enacted by Congress were in conformity with the grants of political power embraced in the instrument which created it. The grant of the judicial power of the United States estopped the people of every State from claiming a right to pass upon the constitutional validity of any exercise of its legislative or executive authority."

APPENDIX 32A

(II Page 265)

It seems curious that there should be such a government as that indicated by Mr. Curtis, which yet was a government lacking citizens of its own; but, according to Judge Curtis, in an

opinion which did its part in bringing on the War between the States, these "inhabitants (who) could no more absolve themselves collectively, than they could separately, from the political duty and obligation to obey the laws and submit to the authority of Government" of the United States, were only citizens under that government in as much as their State relation gave them the privileges and duties of such; and there was no such thing *per se* as citizenship of the United States.

In his dissenting opinion in the Dred Scott case, he said:

"The citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States.' Nowhere else in the Constitution is there anything concerning a general citizenship; but here, privileges and immunities to be enjoyed throughout the United States, under and by force of the national compact, are granted and secured. In selecting those who are to enjoy these national rights of citizenship, how are they described? As citizens of each State. It is to them these national rights are secured. The qualification for them is not to be looked for in any provision of the Constitution or laws of the United States. They are to be citizens of the several States, and, as such, the privileges and immunities of general citizenship, derived from and guaranteed by the Constitution, are to be enjoyed by them. It would seem that if it had been intended to constitute a class of native-born persons within the States, who should derive their citizenship of the United States from the action of the Federal Government, this was an occasion for referring to them. It cannot be supposed that it was the purpose of this article to confer the privileges and immunities of citizens in all the States upon persons not citizens of the United States.

"And if it was intended to secure these rights only to citizens of the United States, how has the Constitution here described such persons? Simply as citizens of each State."

APPENDIX 32B

(II Page 266)

DID the people of South Carolina make a cession of political power to the government of the United States in 1788 "*in an irrevocable form and without any reservation save,*" etc.

1st. All the States entered the Union on a precisely equal footing; any right possessed or reserved by Virginia or New York, Massachusetts or Rhode Island, was in the same kind and degree possessed or reserved by South Carolina and all the other States. 2d. Virginia's ratification of the Constitution is in the following terms, *viz.*:

"We, the delegates of the people of Virginia, duly elected in pursuance of a recommendation from the General Assembly, and now met in Convention, having fully and freely investigated and discussed the proceedings of the federal Convention, and being prepared, as well as the most mature deliberation hath enabled us, to decide thereon, Do, in the name and in behalf of the people of Virginia, declare and make known, that the powers granted under the Constitution, being derived from the people of the United States, be resumed by them whenever the same shall be perverted to their injury or oppression, and that every power, not granted thereby, remains with them, and at their will; . . .

"We, the said delegates, in the name and behalf of the people of Virginia, do, by these presents, assent to and ratify the Constitution, . . . hereby announcing to all those whom it may concern, that the said Constitution is binding upon the said people . . ."

New York's ratification is in the following terms; *viz.*:

"We the Delegates of the People of the State of New York . . . Do declare and make known . . . That all Power is originally vested in and consequently derived from the People . . . That the Powers of Government may be reassumed by the People, whensoever it shall become necessary to their

Happiness; that every Power, Jurisdiction and right, which is not by the said Constitution clearly delegated to the Congress of the United States, or the departments of the Government thereof, remains to the People of the several States, or to their respective State Governments to whom they may have granted the same. . . .”

Rhode Island’s ratification is in the following terms: *viz.*:

“We the delegates of the people of Rhode Island and Providence Plantations . . . do declare and make known . . . That all power is naturally vested in and consequently derived from the people . . . That the powers of government may be reassumed by the people whensoever it shall become necessary to their happiness.”

The ratification of South Carolina says:

“. . . the right of prescribing the manner . . . of holding the elections to the federal legislature should be for ever inseparably annexed to the sovereignty of the several states . . . This convention doth also declare, That no section or paragraph of the said constitution, warrants a construction that the states do not retain every power not expressly relinquished by them, and vested in the general government of the Union.”

These ratifications of New York, Virginia, and Rhode Island, explicitly stating that “the powers of Government may be reassumed by the People, whensoever it shall become necessary to their Happiness; that every Power, Jurisdiction and right, which is not by the said Constitution clearly delegated to the Congress of the United States, or the departments of the Government thereof, remains to the people of the several States, or to their respective State Governments to whom they may have granted the same,” shows that, to whomever was reserved the right of revocation of the “grant of political sovereignty” made by the States “to the government of the United States,” such right of revocation was reserved, and consequently that it is a grave error to assert that it was made “in an irrevocable form.”

N. B. It must have been revocable either by the people of

the United States as a whole, or severally as States, and it is surely a legal and political solecism to assert that one people can revoke what another people has granted; or that a body of delegates who, "*in the name and behalf of the people of Virginia . . .* assent to and ratify the Constitution . . . announcing . . . that the said Constitution is binding *upon the said people,*" do by that instrument announce the right of other peoples, whom that instrument in no iota binds, to revoke the cession of powers granted by the people of Virginia, "if perverted to their injury or oppression." What constitutional government ever was or could be based upon such a principle? Therefore, if, as has been shown, these powers were granted by the people of the States severally, it follows that in those people does the declared right of revocation inhere.

"Next in importance among these historical evidences are the reports of the discussions and proceedings of the conventions held in the several States for passing upon the proposed Constitution. If we search the records of these conventions, we find no assertion, no discussion, no claim of a right of withdrawal or of the dissolubility of the bond of the Union when once established. The ratification of the Constitution by the conventions is absolute, unqualified, and unconditioned in each instance. New York and Massachusetts called for amendments, but not as conditions precedent. Virginia prefaced her ratification with the expression of some opinions, among which was one that as the powers of the new government were derived from the people of the United States, they might be reassumed by them. This, whatever may be its precise meaning, cannot be construed in any case as an assertion of the right of State secession. At most it only asserts the right of the nation, or people of the United States, to dissolve the government which they had formed.^{32B1} If the assertion had been that the States might resume the powers granted in the Constitution, it would have been evidence of an opinion that secession was a State right. Yet Virginia's rati-

fication of the Constitution was as full and unreserved and unequivocal as that of any other State." *

A "search of the records of these conventions" seems scarcely to justify so positive a conclusion. Debating the proposed form of ratification Mr. Nicholas (later one of the instigators of the Virginia Resolutions)

"contended that the language of the proposed ratification would secure everything which gentlemen desired, as it declared that all powers vested in the Constitution were derived from the people, and might be resumed by them whensoever they should be perverted to their injury and oppression; and that every power not granted thereby remained at their will. No danger whatever could arise; for, says he, these expressions will become a part of the contract. The Constitution cannot be binding on Virginia, but with these conditions. If thirteen individuals are about to make a contract, and one agrees to it, but at the same time declares that he understands its meaning, signification, and intent, to be (what the words of the contract plainly and obviously denote), that it is not to be construed so as to impose any supplementary condition upon him, and that he is to be exonerated from it whensoever any such imposition shall be attempted,—I ask whether, in this case, these conditions, on which he has assented to it, would not be binding on the other twelve." †

In view of this simile of the "thirteen individuals about to make a contract," and the deduction he draws therefrom, this ratification in his view can *certainly* only mean a reservation as to the rights of the people of Virginia specifically. The context of the Debates as fully supports this conclusion as does the language. The gentlemen whose desires Mr. Nicholas said would be secured by the form of ratification adopted, were Mr. Henry, Mr. Grayson, and their following, the burden of whose objection to the Constitution was that it placed the people of Virginia at the mercy of a Congress which only in

* D. H. Chamberlain, "Historical Conception of the Constitution," 1902.

† "Debates of the Ratifying Convention of Virginia," Elliot, Vol. III, pp. 625-626.

small part represented that State; *i. e.*, Mr. Grayson (who was appointed a member of the Committee to report proposed amendments to the Constitution) said:

“ . . . the present Constitution . . . my greatest objection is, that it will, in its operation, be found unequal, grievous, and oppressive. If it have any efficacy at all, it must be by a faction—a faction of one part of the Union against the other.”

Again he said:

“I conceive the investigation of this subject, which materially concerns the welfare of this country, ought not to wound the feelings of any gentleman. I look upon this as a contest for empire. Our country is equally affected with Kentucky. The Southern States are deeply interested in this subject. If the Mississippi be shut up, emigrations will be stopped entirely. There will be no new states formed on the western waters. This will be a government of seven states. This contest of the Mississippi involves this great national contest; that is, whether one part of the continent shall govern the other. The Northern States have the majority, and will endeavor to retain it. This is, therefore, a contest for dominion—for empire.” *

Mr. Henry said:

“But sure I am that the dangers of this system are real, when those who have no similar interests with the people of this country (*i. e.* Virginia) are to legislate for us—when our dearest interests are left in the power of those whose advantage it may be to infringe them.” †

Again he said:

“And this must and will be done by men, a majority of whom have not a common interest with you. They will, therefore, have no feeling of your interests.” ‡

* Elliot's "Debates," Vol. III, p. 365.

† *Ibid.*, p. 313.

‡ *Ibid.*, pp. 589-590.

Quotations might be multiplied if necessary.

It is to suppose that men of the acuteness and experience of these, were affected with complete political blindness to think with Mr. Chamberlain, that reservations such as these quoted could be supposed to satisfy their fears if they referred to the rights of the people of the United States in general; thus throwing the remedy for anticipated wrongs of a state, into the hands of those from whom those wrongs were expected to come.

What was the remedy proposed for such perversion of the granted powers? Precisely that attempted by South Carolina.

"We will resist, did my friend say? conveying an idea of force. Who shall dare to resist the people? No, we will assemble in Convention; *wholly recall our delegated powers* [*italics are author's*], or reform them so as to prevent such abuses," etc.*

To assume that this means that "the people" intended are not the people of the State of Virginia, but those of the United States, supposes not merely the absurdity previously developed, not merely the political solecism of a single State assuming to speak for the whole Union (as no State could delegate power for another, so neither could it withdraw power granted by another), but a complete contradiction in practice to the whole procedure of the formation of the Confederacy and the Constitution. Who could recall delegated powers but those by whom they were delegated? in this instance, the people of Virginia. Could Virginia assume to recall powers delegated by Massachusetts or Rhode Island?

In the same Convention Mr. (later Judge) Marshall said:

"We are threatened with the loss of our liberties by the possible abuse of power, notwithstanding the maxim that those who give may take away. It is the people that give power, and can take it back . . . They are the masters who give it, and of whom their servants hold it." †

In the same Convention, Mr. Randolph said:

* Pendleton, in Virginia Ratifying Convention.

† Elliot, Vol. III, p. 233.

"Gentlemen will perhaps ask me, Why, if you know the Constitution to be ambiguous, will you vote for it? I answer, that I see a power which will be probably exercised to remedy this mischief . . . If it be not considered too early, as ratification has not yet been spoken of, I beg leave to speak of it. If I did believe, with the honorable gentleman [Henry] that all power not expressly retained was given up by the people, I would detest this government.

"But I never thought so, nor do I now. If, in the ratification, we put words to this purpose, 'and that all authority not given is retained by the people, and may be resumed when perverted to their oppression; and that no right can be cancelled, abridged, or restrained, by the Congress, or any officer of the United States,'—I say, if we do this, I conceive that, as this style of ratification would manifest the principles on which Virginia adopted it, we should be at liberty to consider as a violation of the Constitution every exercise of a power not expressly delegated therein."

In the Massachusetts Ratifying Convention, Mr. Samuel Adams said:

"Your Excellency's first proposition is, 'that it be explicitly declared, that all powers not expressly delegated to Congress are reserved to the several States . . . ' This appears to my mind, to be a summary of a bill of rights . . . It . . . gives assurance that, if any law made by the Federal Government shall be extended, beyond the power granted by the proposed Constitution and inconsistent with the Constitution of this State, it will be an error . . . It is consonant with the second article in the present Confederation, that each State retains its sovereignty," etc.*

Under this impression, Mr. Adams voted for ratification. Is it possible that such expressions can be so construed as reasonably to seem that Mr. Adams looked to the action of the whole people of the United States, to safeguard the rights of the people of Massachusetts?

The declaration of the Convention of New York is to some

* Elliot, Vol. II, pp. 130, 131.

extent more specific than the Virginia ratification, in that it connects the declaration that all powers are originally vested in and may be reassumed by the people, with the concomitant declaration, "that every power, jurisdiction, and right, which is not by the said Constitution clearly delegated to the Congress of the United States, or the departments of the government thereof, remains to the people of the several states, or to their respective state governments, to whom they may have granted the same." Clearly if the powers, etc., remain to the people "of the several states," it is only those people (not the people of the United States) who can exert them or remedy their infraction.

Moreover, that the people whose right to reassume the powers granted are here asserted are the people of New York and Rhode Island respectively, is a belief enforced by the same general reasons as were adduced in the case of the people of Virginia.

It might not unfairly be argued that it is a contradiction in terms to speak of a grant of political sovereignty made "in an irrevocable form, and without any reservation save of the powers of government which they did not grant." When South Carolina in her act of ratification, spoke of herself as a sovereign State, and also declared "that no section or paragraph of the said constitution, warrants a construction that the states do not retain every power not expressly relinquished by them, and vested in the general government of the Union" it seems fairly inferable that an implication is made of a right to remedy in such manner as may seem to her most eligible, any attack upon the reserved rights.

Contemporary evidence corroborates the view here developed, at least as far as might be expected. It is not surprising that there is comparatively little on this point. It was a delicate subject. As Mr. Farrand says: "The great issue of states rights came forward most dramatically in the concrete cases of nullification and secession. It would have been inexpedient to have forced this issue of 1787, when the fate of any sort of a central government was doubtful . . . Yet it is inconceivable that if Madison, or Wilson, or Hamilton had

been permitted to frame a logical or consistent instrument of government, a constitution would have resulted which would not have covered such contingencies." *

Fortunately they were not so permitted; for it is safe to assume that no such logical government would have stood the wear and tear of use so well as the one composed of parts fitted to each other by the attrition of conflicting interests, as the stones of the ancient Cyclopean walls were worn to a close joint by being rubbed against each other.

The whole Constitution was in a sort a drawn battle. As Hamilton said in the New York Ratifying Convention: "The whole plan was one of accommodation." The number, rather than the paucity, of expressions of opinions surviving is, under these circumstances, matter for surprise.

Judge Chamberlain says:

"And I say that when the Constitution was adopted by the votes of States at Philadelphia, and accepted by the votes of States in popular conventions, it is safe to say that there was not a man in the country from Washington and Hamilton on the one side, to George Clinton and George Mason on the other, who thought or claimed that the new system was anything but a perpetual Union and an indestructible Constitution, from which no right of withdrawal existed, and from which no State once entering the Union could retire in any way or under any circumstances, except by force or the Consent of the government of the Union." †

Considering Mr. Madison's leanings, both at the time and later, any allusion by him to such a right, is surely important. In one of those Ratifying Conventions (viz., that of Virginia) to which he so often refers as (next to the instrument itself), the only authentic source from which to draw its meaning, he said of one of its provisions (being heckled by Mr. Henry, presumably beyond caution): "If we be dissatisfied with the national government, if we should choose to renounce it, this is an additional safeguard to our defence." ‡

* "The Framing of the Constitution," p. 206; N. Y., 1913.

† "Historical Conception of the Constitution," 1902.

‡ Elliot's "Debates," Vol. III, p. 414.

This can mean only one of two things: either an allusion to the right of "natural resistance," *i. e.*, revolution, or to a Constitutional right to withdraw from the Constitution at will. The wording (as were the circumstances) is against the former supposition: "If we should be dissatisfied with the national government, if we should choose to *renounce it*," would be an inapt manner of referring to the right of revolution,—little likely to be used by a man of Mr. Madison's careful accuracy.

In the Federal Convention

"Mr. Madison objected to one for every forty thousand inhabitants as a perpetual rule. The future increase of population, *if the union should be permanent*, will render the number of representatives excessive." *

"Mr. Gorham (of Massachusetts). 'It is not to be supposed that the government will last so long as to produce this effect. Can it be supposed that this vast country, including the western territory, will, one hundred and fifty years hence, remain one nation?'

"Mr. Ellsworth (of Connecticut). 'If the government should continue so long, alterations may be made in the Constitution,' etc." †

Here again Mr. Madison's language, still less that of Mr. Gorham (a representative of that State before whose Historical Society Mr. Chamberlain's address was made), is such as to poorly justify Mr. Chamberlain's assertion (or Mr. Madison's own doctrine).^{32B½} (v. 2, p. 413).

Before giving other citations from that section from which, in earlier days, most of the opposition to the Union came,—viz., New England,—let Mr. Washington's opinion be considered.

"The unity of government which constitutes you one people, is also now dear to you. It is justly so; for it is a main pillar in the edifice of your real independence—the support of your

* Italics are author's.

† Madison, Debates in Federal Convention. Elliot's "Debates," Vol. V, p. 392.

tranquillity at home, your peace abroad, of your safety, of your prosperity, of that very liberty which you so highly prize. But as it is easy to foresee that, from different causes and from different quarters, much pains will be taken, many artifices employed to weaken in your minds the conviction of this truth; as this is the point in your political fortress against which the batteries of internal and external enemies will be most constantly and actively (though often covertly and insidiously) directed,—it is of infinite moment that you should properly estimate the immense value of your national union to your collective and individual happiness; that you should cherish a cordial, habitual, and immovable attachment to it; accustoming yourself to think and speak of it as of the palladium of your political safety and prosperity, watching for its preservation with jealous anxiety; discountenancing whatever may suggest even a suspicion that it can in any event, be abandoned; and indignantly frowning upon the first dawning of every attempt to alienate any portion of our country from the rest, or to enfeeble the sacred ties which now link together the various parts. . . .

“While, then, every part of our country thus feels an immediate and particular interest in union, all the parts combined cannot fail to find, in the united mass of means and efforts, greater danger, a less frequent interruption of their peace by foreign nations; and what is of inestimable value, they must derive from union an exemption from those broils and wars between themselves, which so frequently afflict neighboring countries, not tied together by the same government; which their own rivalship alone would be sufficient to produce, but which opposite foreign alliances, attachments and intrigues, would stimulate and embitter. Hence, likewise, they will avoid the necessity of those overgrown military establishments, which, under any form of government, are inauspicious to liberty, and which are to be regarded as particularly hostile to republican liberty; in this sense it is that your union ought to be considered as a main prop of your liberty, and that the love of one ought to endear to you the preservation of the other.

"These considerations speak a persuasive language to every reflecting and virtuous mind, and exhibit the continuance of the Union as a primary object of patriotic desire. Is there a doubt, whether a common government can embrace so large a sphere? Let experience solve it. To listen to mere speculation, in such a case, were criminal. We are authorized to hope, that a proper organization of the whole, with the auxiliary agency of governments for the respective subdivisions, will afford a happy issue to the experiment. It is well worth a fair and full experiment. With such powerful and obvious motives to Union, affecting all parts of our country, while experience shall not have demonstrated its impracticability, there will always be reason to distrust the patriotism of those who, in any quarter, may endeavor to weaken its bands. . . ."

This is the language of a patriot and statesman; and whether written by Hamilton or Madison, is substantially the opinion of Washington himself, since he revised and approved it;—but is it the language of a statesman addressing a homogeneous country, to the government of which they all stand in the fixed relation of citizens, in whom the duty of union was compulsive? There is in the whole address but one phrase which indicates such a belief,—almost tentatively.

With justice, then, President Jackson, in his second inaugural, speaking of Washington, says:

"The federal constitution was then regarded by him as an experiment, and he so speaks of it in his address."

This tone is not confined to Washington's address; it runs through his private letters and public papers; he is constantly seeking means to bind together the units of the Union,—always appealing to their interests, never speaking in a way to imply any irrevocable constitutional bond.

"Amongst the motives to such an institution [a national university] the assimilation . . . of our countrymen by the common education of . . . our youth from every quarter well deserves attention. The more homogeneous our citizens can

be made . . . the greater will be our prospect of permanent union." *

"I need not remark to you, Sir, . . . how necessary it is to apply the cement of interest to bind all parts of the Union together . . ." †

"There is nothing that binds one country or one State to another, but interest. Without this cement the western inhabitants, who more than probably will be composed in a great degree of foreigners, can have no predilection for us, and a commercial connexion is the only tie we can have upon them." ‡ ^{32B2}

"In the mean while to open *all* the communications, which nature has afforded, between the Atlantic States and the western territory, and to encourage the use of them to the utmost. In my judgment it is a matter of very serious concern to the well-being of the former to make it the interest of the latter to trade with them; without which, the ties of consanguinity, which are weakening every day, will soon be no bond, and we shall be no more a few years hence to the inhabitants of that country, than the British and Spaniards are at this day; not so much, indeed, because commercial connexions, it is well known, lead to others, and united are difficult to be broken." §

"There is a matter . . . of great political importance . . . It is to prevent the trade of the western territory from settling in the hands either of the Spaniards or British. If either of these happen, there is a line of separation drawn between the eastern and western country at once . . . and equally unnecessary would it be to observe that it is by the cement of interest alone we can be held together. If then the trade of that country should flow through the Mississippi or the St. Lawrence; the inhabitants thereof should form commercial connexions . . . they would in a few years be as unconnected with us as are those of South America." ||

"I am sorry such jealousies as you speak of should be gain-

* Washington, Speech to both Houses of Congress, December 7, 1796.

† Washington to Benjamin Harrison, October 10, 1784.

‡ Letter to Richard Henry Lee, August 22, 1785.

§ Letter to Henry Lee, June 18, 1786.

|| Letter of Washington, *circa* 1784. ^{32B3}

ing ground . . . but admit the fact . . . does it amount to more than what was known to every man of information before . . . the adoption of the Constitution? . . . And I will ask another question . . . if the eastern and northern States are dangerous in *union*, will they be less so in *separation*? If self-interest is their governing principle will it forsake them, or be less restrained by such an event? . . . What would Virginia (and such other States as might be inclined to join her) gain by a separation? Would they not . . . be the weaker party?"

"True wisdom, they acknowledge, should direct temperate and peaceable measures; but, they add, the division of sentiments and interest happens unfortunately to be so geographical, that no mortal can say that what is most wise and temperate would prevail against what is more easy and obvious. They declare they can contemplate no evil more incalculable, than the breaking of the Union into two or more parts; yet when they view the mass which opposed the original coalescence, and when they consider that it lay chiefly in the southern quarter, and that the legislature have availed themselves of no occasion of allaying it, but, on the contrary whenever northern and southern prejudices have come into conflict, the latter have been sacrificed and the former soothed." *

So Jefferson in his inaugural address, 1801, speaks of it as an experiment to be pursued because of its advantages, not as a binding agreement.

"If there be any among us who would wish to dissolve this Union . . . let them stand undisturbed as monuments of the safety with which errors of opinion may be tolerated . . . Would the honest patriot in the full tide of successful experiment abandon a government which has so far kept us free and firm. . . ." ^{32B3}

Again, in the privacy of his personal notes, he records:

"I told him (the President) . . . that he was the only man in the United States who possessed the confidence of the

* Washington to Hamilton, July 29, 1792.

whole . . . that the longer he remained the stronger would become the habits of the people in submitting to the government, and in thinking it a thing to be maintained, that there was no other person who would be thought anything more than the head of a party."

Writing to Washington on his proposed retirement from the Presidency, he says :

"The confidence of the whole Union is centred in you. Your being at the helm will be more than an answer to every argument which can be used to alarm and lead the people in any quarter into violence or secession. North and South will hang together, if they have you to hang on."

The use of the word "secession" by Mr. Jefferson is noteworthy, for its implication of formal, regularized action; and, since Mr. Jefferson's authority might scarcely be accepted by a school which never loved him or his doctrines, it is noteworthy that the word is used in a letter to Mr. Washington, who will not be suspected by that school of undue sympathy with those doctrines.

"He then expressed his concern at the difference . . . between the Secretary of the Treasury and myself . . . That as to the idea of transforming this government into a monarchy, he did not believe that there were ten men in the United States whose opinions were worth attention, who entertained such a thought. I told him there were many more than he imagined . . . that though the people were sound, there were a numerous sect who had monarchy in contemplation; that the Secretary of the Treasury was one of these. That I had heard him say that this constitution was a shilly shally thing of mere milk and water, which could not last, and was only good as a step to something better." *

This again manifests the opinion of a statesman desirous of the continuance of the Union, but certainly not considering it bound by one government. It also shows the opinion of Mr.

* Jefferson, "Anas," October 1, 1792; N. Y., 1903.

Hamilton, who never endeavoured to conceal his opinion of the merely temporary nature of the Constitution,—as was well known among his contemporaries.^{31B½} (v. 2, p. 413).

"Tench Coxe tells me, that a little before Hamilton went out of office, or just as he was going out, talking with him his last conversation, and among other things, on the subject of their differences, 'for my part,' says he, 'I am myself a monarchist; I have no objection to a trial being made of this thing of a republic, but,' etc." *

"The ill opinion of Jefferson, and jealousy of the ambition of Virginia, is no inconsiderable proof of good opinion in that country (New England). But these causes are leading to an opinion that a dismemberment of the Union is expedient," etc.†

"It is perhaps known but to a few that the project of a dismemberment of this country is not a novel plan, growing out of the recent measures of government, as has been pretended. It has been cherished by a number of individuals for a series of years; and, a few months before the death of a distinguished citizen, whose decease so deeply excited the public sensibility (Hamilton), it was proposed to him to enlist his great talents in the promotion of this most nefarious scheme." ‡

"Alexander Hamilton condemning Mr. Adams' writings . . . declared in substance 'I own it is my own opinion, though I do not publish it in Dan or Beersheba, that the present government is not that which will answer the ends of society, by giving stolidity and protection to its rights, and that it will probably be found expedient to go into the British form,' etc. § ^{32B4}

"This coalition of Hamiltonian Federalism with the Yankee spirit had produced as incongruous and absurd a system of politics as ever was exhibited in the vagaries of the human mind. It was compounded of the following prejudices . . .

* December 27, 1798. Jefferson, "Anas," 1903.

† Alexander Hamilton, "Works," Vol. VII, p. 851. This quotation is retained though there is some inaccuracy in the authority given.

‡ De Witt Clinton, in Senate of New York. January 31, 1809.

§ Jefferson, "Anas," p. 44; N. Y., 1903.

2. A strong aversion to republics and republican government, with a profound impression that our experiment of a confederated republic . . . 3. A deep jealousy of the Southern and Western States, and a strong disgust at the effect of the slave representation in the Constitution of the United States.

"4. A belief that Mr. Jefferson and Mr. Madison were servilely devoted to France, and under French influence.

"Every one of these sentiments weakened the attachments of those who held them to the Union, and consequently their patriotism. The sentiment itself, in a great measure, changed its object. The feeling against the general administration was so strong that it extended itself to the States and people by which it was supported; and all the impulses of patriotism became concentrated upon New England; and the temper of hostility, instead of patriotism, connected itself with every thought of the general government. All these opinions will be found disclosed in the vivid and forcible language of Fisher Ames, in the volume of his works which was published shortly after his death. I refer you particularly to the essay in it entitled 'Dangers of American Liberty,' for a full exposition of this system of opinions.

". . . It will, therefore, not be surprising that the final report of the Convention begins its calculation of the value of the Union by the explicit declaration, that a sentiment prevailed to no inconsiderable extent that the time for a change was at hand, and that the causes of it were intrinsic and incurable defects in the Constitution," etc.*

Mr. Gouverneur Morris was one of the most active and effective supporters of a strong nationalized government in the Constitutional Convention. Chairman of the Committee on Style, etc., he had no hesitation in advocating secession:

"I will not . . . trace the ills we suffer up to their source . . . For . . . those who inculcate principles inconsistent with all social union, charge the opponents of their disorganizing principles with an intention to separate the Eastern from the Southern States. That the course pursued . . . will,

* Henry Adams, "New England Federalism," pp. 284-285; B., 1877.

if persisted in, occasion that separation there can be but little doubt, but he who spent the flower of youth and the strength of manhood in labouring to promote and confirm the American union, can never, but in the last necessity, recommend its dissolution . . . Federalists are too proud of the name they bear, to view unmoved, the danger to which our federal compact is exposed . . . But although we deprecate the impending separation, yet we conceive that, under existing circumstances, prudent men should prepare for events, and fortify their hearts for such struggles as the cause of justice," etc.*

"That the General Government would exert themselves to frustrate the project of inland navigation in New York Morris seemed convinced, to judge from the following letter to his nephew, David B. Ogden, February 11th (1814), referring to the attempts made at Albany to repeal that part of the law which enabled the commissioners to make a loan. 'In my opinion,' he wrote, 'it is merely an attack upon the outwork, by those who mean to prevent the making of a canal. It is the result of an intrigue by the General Government to keep New York down. Moreover, they apprehend that the friends of the canal will eventually acquire too much weight among the Western people, and there is still a latent wish to bring about a separation of our State. While the war lasts we can't borrow money in Europe, and if it lasts much longer there will be no borrowing either at home or abroad, for we shall have neither credit nor means. The question to be settled between the Northern and Southern States, reduced to its simple elements, is merely this: Shall the citizens of New York be the slaves or masters of Virginia? To develop this idea is not needful just now. Those motives which prompt statesmen are not sufficiently strong to actuate the general mass. Your friends were enough their own friends to be stanch; we should take that lead which, as it is, we must follow. But the end we shall arrive at is the same in gross, though the fruit posterity will gather may not be so sweet as if their fathers had the courage to plant good trees.

* Oration before the New York Washington Benevolent Society, July 5, 1813.

"I say, the end we shall reach is the same. New England will, I presume, meet in convention and cast off the shackles of our National Government. If so, and if they are not idiots, the first step will be to take possession of our city. I ask, then, will the inhabitants fight to support the Congress and their embargo against free trade, New England, and old England? I believe not. If they should, they will do a great favor to New England; for the sale of confiscated houses, ships, and stores will defray the expense of a campaign. New York in possession of the patriots, will those who dwell east of the Hudson River fight for Virginia? I doubt it; but of this I am sure, that the battle could not be long. If five thousand men from Connecticut march into New York by the middle of June, the Fourth of July will be celebrated east of the Hudson without one solitary toast to the Union. All this must strike the mind of any man who thinks on the subject for a few minutes, and in the most cursory manner. It only remains, therefore, to inquire what will those do who live west of the Hudson; for, turn the matter as you please, you must come at last to this simple question, Where shall the boundary be? Shall it be on the Hudson, the Delaware, the Susquehanna, or the Potomac? . . .'"*

"I care nothing now about your action and doing. Your decree of conscription . . . are alike indifferent to one whose eyes are fixed on a Star in the East which he believes to be the day spring of freedom and glory. The traitors and madmen assembled at Hartford will, I believe, if not too tame and timid, be hailed hereafter as the patriots and sages of their day and generation. May the blessing of God be upon them," etc.†

"Doubts are, I find, entertained whether Massachusetts is in earnest, and whether she will be supported by the New England family. But surely these outrageous measures must rouse their patriot sentiment to cast off the load of oppression." ‡

* "Diary and Letters of Gouverneur Morris," ed. by Anne C. Morris, 1888; Vol. II, pp. 557-558.

† Gouverneur Morris to Pickering, December 22, 1814; Henry Adams, "New England Federalism," p. 419.

‡ Gouverneur Morris, November 1, 1814, to Pickering, *ibid.*, p. 403.

Mr. Adams, who had foreseen the impermanence of the Confederation, indulged in the same vision as to the Constitution:

"December 13, 1803. The Reverend Mr. Coffin of New England, who is now here soliciting donations for a college in Greene County, in Tennessee, tells me that when he first determined to engage in this enterprise, he wrote a paper recommendatory of the enterprise, which he meant to get signed by clergymen, and a similar one for persons in a civil character, at the head of which he wished Mr. Adams to put his name, he being then President . . . Mr. Adams, after reading the paper and considering, said, 'He saw no possibility of continuing the Union of the States; that their dissolution must necessarily take place; that he therefore saw no propriety in recommending to New England men to promote a literary institution in the south, that it was in fact giving strength to those who were to be their enemies . . .'" *

The ensuing anecdotes are also from Jefferson's "Anas."

"The President . . . told me . . . that with respect to the existing causes of uneasiness, he thought there were suspicions against a particular party, which had been carried a great deal too far; there might be *desires*, but he did not believe there were *designs*, to change the form of government into a monarchy; that there might be a few who wished it in the higher walks of life, particularly in the great cities, but that the main body of the people in the eastern States were as steadily for republicanism as in the southern. That the pieces lately published . . . tended to produce a separation of the Union, the most dreadful of all calamities," etc.†

"Langdon tells me, that at the second election of President and Vice-President of the United States, when there was a considerable vote given to Clinton in opposition to Mr. Adams, he took occasion to remark it in conversation in the Senate chamber with Mr. Adams, who, gritting his teeth, said, 'damn 'em, damn 'em, damn 'em, you see that an elective government

* Jefferson, "The Anas."

† July 10, 1792.

will not do' . . . Harper, lately in a large company, was saying that the best thing the friends of the French could do, was to pray for the restoration of their monarch. 'Then,' says a bystander, 'the best thing we could do, I suppose, would be to pray for the establishment of a monarch in the United States.' 'Our people,' says Harper, 'are not yet ripe for it, but it is the best thing we can come to, and we shall come to it.' Something like this was said in the presence of Findley, Dec. 26, 1797. He now denies it in the public papers though it can be proved by several members." *

"Mr. Baldwin tells me that in a conversation yesterday with Goodhue, on the state of our affairs, Goodhue said, 'I'll tell you what, I have made up my mind on this subject; I would rather the old ship should go down than not' [meaning the Union of the States]." †

"King said that it, was true the committee kept back their reports, awaiting the event of the question about appropriation; that if that was not carried, they considered legislation as at an end; that they might as well break up and consider the Union as dissolved. Tazewell expressed his astonishment at these ideas, and called on King to know if he had misapprehended him. King rose again and repeated the same words. The next day Cabot took an occasion in debate, and so awkward a one as to show it was a thing agreed to be done, to repeat the same sentiments in stronger terms, and carried further, by declaring a determination on their side to break up and dissolve the government." ‡

"W. C. Nicholas tells me that in a conversation with Dexter three or four days ago . . . On the whole, Mr. Nicholas thinks he perceives in that party, a willingness and a wish to let everything go from bad to worse . . . in hopes it may bring on confusion, and open a door to the kind of government they wish. In a conversation with Gunn, who goes with them, but thinks in some degree with us, Gunn told him that the very game which the minority of Pennsylvania is now playing with

* Jefferson, "Anas," March, 1798.

† *Ibid.*, January 5, 1798.

‡ *Ibid.*, March 1, 1798.

McKean . . . was meditated by the same party in the federal government in case of the election of a republican President; and that the eastern States would in that case throw things into confusion, and break the Union. That they have in a great degree got rid of their paper, so as no longer to be creditors, and the moment they cease to enjoy the plunder of the immense appropriations now exclusively theirs, they would aim at some order of things." *

"Mr. Lear called on me . . . He regretted that the President was not in the way of hearing full information, declared he communicated to him everything he could learn himself; that the men who vaunted the present government so much on some occasions were the very men who at other times declared it was a poor thing, and such a one as could not stand," etc.†

"The President . . . said . . . That the constitution we have is an excellent one, if we can keep it where it is; that it was, indeed, supposed there was a party disposed to change it into a monarchical form, but he could conscientiously declare there was not a man in the United States who would set his face more decidedly against it than himself. Here I interrupted him . . . 'No rational man in the United States suspects you of any other intention; but there does not pass a week, in which we cannot prove declarations dropping from the monarchical party that our government is good for nothing, is a milk and water thing which cannot support itself, we must knock it down, and set up something of more energy.' ‡

"The President . . . then fell on the representation bill . . . I had before given him my opinion in writing, that the method of apportionment was contrary to the constitution. He agreed that it was contrary to the common understanding of the instrument, and to what was understood at the time by the makers of it; that yet it would bear the construction which the bill put, and he observed that the vote for and against the bill was perfectly geographical, a northern against a southern

* Jefferson, "Anas," January 19, 1800.

† *Ibid.*, April 7, 1793.

‡ *Ibid.*, August 6, 1793.

vote, and he feared he should be thought to be taking side with a southern party . . . He here expressed his fear that there would, ere long, be a separation of the Union; that the public mind seemed dissatisfied and tending to this . . .” *

“Beckley tells me he had the following fact from Lear. Langdon, Cabot, and some others of the Senate, standing in a knot before the fire after the Senate had adjourned, and growling together about some measure which they had just lost; ‘Ah!’ said Cabot, ‘things will never go right till you have a President for life, and an hereditary Senate.’ Langdon told this to Lear who mentioned it to the President. The President seemed struck with it, and declared he had not supposed there was a man in the United States who could have entertained such an idea.” †

“He [the President] asked me if the treaty stipulating a sum and ratified by him, with the advice of the Senate, would not be good under the Constitution, and obligatory on the Representatives to furnish the money? I answered it certainly would, and that it would be the duty of the Representatives to raise the money; but that they might decline to do what was their duty . . . He said that he did not like shoving too much into democratic hands, that if they would not do what the constitution called on them to do, the government would be at an end, and must *then assume another form*. He stopped here; and I kept silence to see whether he would say anything more in the same line, or add any qualifying expression to soften what he had said, but he did neither.” ‡

“This measure [Assumption] produced the most bitter and angry contest ever known in Congress, before or since the Union of the States . . . Congress met and adjourned from day to day without doing anything, the parties being too much out of temper to do business together. The eastern members particularly, who . . . were the principal gamblers in these scenes, threatened a secession and dissolution. Hamilton was in despair . . . He walked me backwards and forwards be-

* Jefferson, “Anas,” April 6, 1792.

† *Ibid.*, December 1, 1793.

‡ *Ibid.*, 1792.

fore the President's door for half an hour. He painted pathetically the temper into which the legislature had been wrought; the disgust of those who were called the creditor states; the danger of the *secession* of their members, and the separation of the States." *

But there are many people who revere the author of the Declaration of Independence beyond words, who yet would hesitate to accept the testimony of Mr. Jefferson in a ten-cent libel suit. It is therefore desirable to provide for these persons corroborative testimony.

"For my part, I say without reserve that *the Union was long ago dissolved*; and I never thought it criminal to compass a dismemberment of the States, although we have been educated with that belief. But I should prefer producing such an event by quiet means. I should like conventions to be called in the several States so disposed, and to proceed with calmness and dignified firmness. Sick as I am . . . I expect to outlive the Union . . . For my part, I think, if the question was barely *stirred* in New England, some States would drop off from the Union like fruit, *rotten ripe*," etc.†

"I have seen your letter to Mr. Cabot . . . on the question of separation, which is a very delicate and important one, considered in the abstract. We all agree there can be no doubt of its being desirable; but," etc.‡

"I have no hesitation myself in saying, that there can be no safety to the Northern States *without a separation from the confederacy*. The balance of power under the present government is decidedly in favor of the Southern States; nor can that balance be changed or destroyed," etc. §

"During the . . . session of Congress of 1803, and 1804, I was a member of the Senate, and was at the city of Washington every day of that session. In the course of the session, at different times and places, several of the Federalists, Sen-

* Jefferson, "Anas," 1790.

† A. C. Hanson to Pickering, January 17, 1810; Henry Adams, "New England Federalism," p. 382; B., 1877.

‡ Stephen Higginson to Pickering, March 17, 1804; *ibid.*, p. 381.

§ Roger Griswold to Oliver Wolcott, March 11, 1804; *ibid.*, p. 356.

ators and Representatives from the New England States informed me that they thought it necessary to establish a separate government in New England; and, if it should be found practicable, to extend it so far south as to include Pennsylvania; but, in all events, to establish one in New England," etc.*

There was nothing in Mr. Plumer's own belief to render the notion an improper one to him.

"My father regarded it as a virtual dissolution of the Union, and held that it was optional with any of the old states to say whether they would longer remain in the present confederacy, or form new ones more to their liking." †

"Amendment means the improvement of what already exists, not a new creation; a change in form, not in substance; in modes of action only, and not in the principles of action. If a change is made in the essential principles of the compact,—if new principles are introduced, and a new order of things established,—it is a question whether the states dissenting from such changes are bound by them. The principles of the confederacy being changed, without the consent of the partners to that confederacy, is not this in fact a dissolution of the Union? Are gentlemen disposed to go thus far? The Constitution is a matter of compromise, as between the large and small states. These compromises are fundamental, and cannot in good faith be altered but by unanimous consent." ‡

"I do not believe in the practicability of a long continued Union. A Northern Confederacy would unite congenial characters and present a fairer prospect of public happiness; while the Southern States having a similarity of habits, might be left to manage their own affairs in their own way. If a separation were to take place, our mutual wants would render a friendly . . . intercourse inevitable . . . [The separation] must begin in Massachusetts," etc. §

* Letter of Mr. Plumer, Henry Adams, "New England Federalism," pp. 144-146; B., 1877.

† "Life of William Plumer," by his son; p. 265; B., 1856.

‡ Speech of William Plumer, *ibid.*, p. 269.

§ Col. Timothy Pickering, Letter of January 29, 1804.

"I will not yet despair. I will rather anticipate a new confederacy, exempt from the corrupt and corrupting influence and oppression of the aristocratic democrats of the South. There will be (and our children, at farthest, will see it) a separation. The white and black population will mark the boundary," etc.*

"If this bill passes, it is my deliberate opinion that it is virtually a dissolution of the Union; that it will free the States from their moral obligation; and as it will be the right of all, so it will be the duty of some, definitely to prepare for a separation—amicably if they can, violently if they must." †

Mr. Quincy, on voicing the above opinion, was called to order (by a Southern member). The Speaker sustained the point and ruled that the suggestion was out of order. An appeal was taken from his decision, and it was reversed. Mr. Quincy went on to vindicate his position, and said :

"Is there a principle of public law better settled or more conformable to the plainest suggestions of reason than that the violation of a contract by one of the parties may be considered as exempting the other from its obligations? Suppose, in private life, thirteen form a partnership . . ." etc.

"Thus stands the Right. But the indissoluble link of union between the people of the several states of this confederated nation, is after all not in the right, but in the heart. If the day should ever come (may Heaven avert it) when the affections of the people of these states shall be alienated from each other; . . . far better will it be for the people of the dis-united states to part in friendship from each other, than to be held together by constraint. Then will be the time for reverting to the precedents which occurred at the formation and adoption of the Constitution, to form again a more perfect union, by dissolving that which could not longer bind, and to

* Col. Timothy Pickering (Postmaster-General, Secretary of War, Secretary of State, etc., in Washington's Cabinet), letter of December 24, 1803; Lodge, "Life of Cabot."

† Hon. Josiah Quincy (member of Congress from Massachusetts in 1811), on Bill for Admission of Louisiana.

leave the separated parts to be reunited by the law of political gravitation to the centre . . .” *

Numerous citations to the same effect may be found in Mr. Adams's "New England Federalism." They should have had the more weight with Judge Chamberlain and his audience, as emanations of the New England conscience. The following anecdote is told:

"I simply asked him (Pickering) if the division of the States was not the object which General Washington most particularly warned the people to oppose. He said, 'Yes, the fear of it was a ghost which for a long time haunted the imagination of that old gentleman.' " †

Mr. Washington was not a man of imagination, and, as may be seen, this ghost was not without considerable body.

Recent history is beginning to recognize the facts, if not their bearing. Mr. Woodrow Wilson summarizes the contemporary attitude fairly enough, if with a cautious touch, and diplomatic regard for received opinions, when he says:

"It is astonishing to us of this generation to learn how much both of hostility and of indifference was felt for the new government, which we see to have been the salvation of the country. Even those who helped make it and who worked most sincerely for its adoption entertained grave doubts as to its durability; some of them even questioned, in despondent moments, its usefulness. Philosophic statesmen like Alexander Hamilton supported it with ardent purpose and sustained hope; but for the average citizen, who was not in the least philosophic, it was at first an object of quite unexciting contemplation. It was for his state, each man felt, that his blood and treasure had been poured out: it was that Massachusetts and Virginia might be free that the war had been fought, not that the colonies might have a new central government set up over them; patriotism was state patriotism. The states were

* John Quincy Adams, "The Jubilee of the Constitution," A Discourse, April 30, 1839; N. Y., 1839.

† "Memoir of William Plumer," May 11, 1829.

living, organic persons: the union was an arrangement,—possibly it would prove to be only a temporary arrangement; new adjustments might have to be made.

"It is by this frame of mind on the part of the first generation that knew the present constitution that we must explain the undoubted early tolerance for threats of secession. The Union was too young to be sacred; the self-love of the states was too pronounced to be averse from the idea that complete state independence might at any time be resumed. Discontent in any quarter was the signal for significant hints at possible withdrawal." *

To the same effect, Mr. Sydney George Fisher:

" . . . After the close of the Revolution, we were for a long time a very disunited country . . . When a national constitution was at last adopted, it was regarded by the rest of the world and even by ourselves, as an experiment which very likely might not in the end succeed." †

"The question, in fact, was, whether the national powers thus delegated were irrevocable, or could at any time be recalled by the constituent State. Such a system, which historically and beyond question was that which did exist in the early days of the Republic, constituted, though we were not conscious of the fact, a phase in a process of evolution—a transitory phase which might result in almost anything—segregation, consolidated nationality, not impossibly chronic anarchy. Meanwhile as a transitory phase—a condition of, so to speak, unstable equilibrium—it was marked by continual dispute and ill-feeling. This was true at nearly all times, and in separate sections of the country at different times. For example, within ten years of the adoption of the Federal Constitution, the National Government, confronted by a supposed political emergency, undertook to assert its sovereignty through the passage of statutes known as the Alien and Sedition Laws. Though the wisdom of the legislation was ques-

* The State and Federal Government."

† "The Legendary and Myth-making Process in History of the American Revolution," 1912.

tionable, that its enactment was within the province of any nationality possessing sovereignty would at once to-day be admitted. It was, however, immediately and peremptorily challenged by the party of States-rights, Thomas Jefferson himself drawing up votes of nullification passed by the Legislatures of three States. Those enactments are now known in history as the 'Kentucky Resolutions of 1798.' " *

APPENDIX 32B¹

(II Page 271)

"THERE cannot be a more direct advance towards monarchy, than the dissolution of the orderly and organized control of the state governments, and an exclusive dependence upon the control of the people; because the very first popular commotion excited by an oppressive or partial law, would furnish a pretext for its introduction. To talk, therefore, of an American people, as sufficiently able and willing to act in concert, so as to furnish a security against the effects of a supreme concentrated power, and to render the mutual control of the state and federal departments unnecessary for the preservation of liberty, to my mind conveys the idea of great ignorance or of great ambition." †

APPENDIX 32B²

(II Page 281)

It should not be without instruction to note on how much lower grounds rested the patriotism of Mr. Washington, than

* Charles Francis Adams, "Trans-Atlantic Historical Solidarity," pp. 40-41.

† John Taylor, of Caroline, "New Views on the Constitution," pp. 187-188; 1823.

that of Mr. Webster. While the former made it rest upon the self-interest of the community, the latter disclaimed any such consideration; in his reply to Mr. Hayne, apostrophizing the flag, he prayed that his dying eyes might see it "bearing no such miserable interrogatory as 'what is all this worth,' " etc.

APPENDIX 32B³

(II Page 282)

If this was the official language of Mr. President Jefferson, the language of Mr. Jefferson, as a citizen of Virginia, can still less be construed as implying that he understood the Constitution to bind the States against withdrawal therefrom.*

APPENDIX 32B⁴

(II Page 284)

"GOUVERNEUR MORRIS, his contemporary, says: 'General Hamilton hated republican government, because he confounded it with democratic government. He believed our administration would be enfeebled progressively at every new election, and become at last contemptible. He never failed on every occasion to advocate the excellence of and avow his attachment to monarchical government.' Still his biographers insist that, apart from Jefferson's charges, there is no proof of Hamilton's monarchical desires." †

APPENDIX 33

(I Page 91)

THE dilemma is not perceived. If "the State has become absolutely free and independent of the United States," it may

* *Vide*, Appendix 31H3, the Kentucky Resolutions, and Solemn Remonstrance of Virginia.

† Edward Payson Powell, "Nullification and Secession in the United States," p. 134; N. Y., 1897.

certainly "be made a party to an international war." But assuredly it cannot be either constitutionally or righteously made so in order to enforce the laws of that country of which it has become free and independent. Under such "a dilemma" France or Russia could properly carry war into New York to enforce obedience to their laws on the citizens of that State.

APPENDIX 34

(I Page 96)

A CERTAIN confusion of ideas becomes evident when Mr. Lincoln's opinions are analyzed.

He gravely modified his majority doctrine in his first "Inaugural":

"Plainly, the central idea of secession is the essence of anarchy. A majority held in restraint by constitutional checks and limitations, and always changing easily with deliberate changes of popular opinions and sentiments, is the only true sovereign of a free people. Whoever rejects it does, of necessity, fly to anarchy or to despotism. Unanimity is impossible; the rule of a minority, as a permanent arrangement, is wholly inadmissible; so that, rejecting the majority principle, anarchy or despotism in some form is all that is left."

But in so far as, in this modified form, the principle announced may be considered correct, it can as used, only be a *petitio principis*. The question at issue entirely regarded those "constitutional checks and limitations" which existed in that federative principle which Mr. Lincoln's doctrine seeks to extirpate.^{34A}

Mr. Lincoln's majority doctrine may be also tested by other opinions enunciated by him. In his speech of January 12, 1848, upon the Mexican War, Mr. Lincoln said:

"If she (Texas) got it in any way, she got it by revolution; one of the most sacred of rights—the right which he believed

was yet to emancipate the world; the right of a people, if they have a government they do not like, to rise and shake it off . . . Minorities must submit to majorities." ^{34B}

How did Mr. Lincoln reconcile his belief in "revolution; one of the most sacred of rights—the right which he believed was yet to emancipate the world; the right of a people, if they have a government they do not like, to rise and shake it off," with his doctrine of the right of the majority to rule? "Minorities must submit to majorities." In that case the minority has no "sacred right" to revolt. The majority only, then, has "the sacred right" to revolt against the minority? But, according to Mr. Lincoln, the majority has the right without revolution (as in a republic it also has the power) to rule. "The rule of a minority as a permanent arrangement is wholly inadmissible, so that rejecting the majority principle, anarchy or despotism in some form is all that is left." But what then becomes of the "sacred right" of revolution, since majorities have no need to use it, and minorities have not got it? Nobody, since the American Revolution, in this country, would think of denying the "natural" right of "a people if they have a government they do not like to rise and shake it off." ^{34C}

Hardly an original State which did not make this "natural" right a Constitutional one, by incorporating the doctrine in its Bill of Rights or Constitution. But they did not speak of "shaking off" government, as though it were a superimposed power; they spoke of withdrawing from it the powers delegated to it, thereby recognizing it as their agent and servant, not their master, and providing a constitutional and, in so far as possible, a peaceful way to rid themselves of "a government they did not like."

To the contrary, the practical working of Mr. Lincoln's doctrine is accurately stated by Mr. J. K. Paulding, Secretary of the Navy:

"An eminent American statesman, high in office, and a candidate for still higher honors, has lately attempted to establish a broad distinction between revolution and secession; in other words, the right to resist and the right of retiring out of

the reach of the necessity of resorting to resistance. His position, if I rightly comprehend him, is, that though people or States may have a right to resist by force in certain contingencies, they have none to retire peaceably beyond the reach of injury and oppression. It seems they have no alternative; they must either peaceably submit, or forcibly resist, for they cannot get out of the way. It follows that all radical changes in the political relations of a State with a Confederation of States, must necessarily be brought about by violence and bloody contentions. Those who cannot live together in peace, must not part in peace; they must resort to the right of the strongest, and fight it out.

“Thus the extermination of a portion of our fellow creatures, perhaps our countrymen, is an indispensable preliminary to all great political changes; and hecatombs must be offered upon the altar of liberty, before she can become a legitimate goddess. The establishment of this principle conceding the right of revolution, and denying that of secession, would in its application to the case now under consideration, leave no resource to any member of this confederation, under the most intolerable oppression, but civil war, with all its aggravations. It leaves open no appeal to the great tribunal of reason, justice and humanity; the right of the strongest is the right divine; and dissensions among a confederation of Christian States, can only be adjusted, like those of the wild beasts of the forest, by a death struggle. I am aware that this has been the almost invariable practice of mankind in every age and country; but never till now do I recollect seeing it asserted that it was the only justifiable mode of settling controversies among States and nations; and it is with no little regret I see this doctrine sanctioned by one whose opinions are of such high authority among a large portion of the American people. I have dwelt more emphatically on this topic, because I consider the right of secession as by far the most important of all the questions involved in the present controversy; and the attack on it as one of the most insidious, as well as dangerous blows, ever levelled at the rights of the States, all of whom are deeply interested in the issue; since those who are now the aggressors, may one

day be placed in a position where it will be their only refuge from the uncontrolled depotism of a majority." *

Which of these doctrines is more in accord with a principle of government once praised by all Americans?—a principle which a recent philosophic historian has described as constituting "The noblest political philosophy in the world;" † and of which a late distinguished American, who managed in some curious way to reconcile his admiration with a diametrically opposite belief, says: "If the long and memorable record of English parliamentary utterance, unique in history and educational importance, contains a finer rhetorical outburst than the foregoing, I can only say I am not acquainted with it." ‡ The passage so praised by praiseworthy men is the following:

"The first thing that we have to consider with regard to the nature of the object is—the number of people in the Colonies. I have taken for some years a good deal of pains on that point. I can by no calculation justify myself in placing the number below two millions of inhabitants of our own European blood and colour; . . . the second mode under consideration is, to prosecute that spirit in its overt acts, as criminal.

"At this proposition, I must pause a moment. The thing seems a great deal too big for my ideas of jurisprudence. It should seem, to my way of conceiving such matters, that there is a very wide difference in reason and policy, between the mode of proceeding on the irregular conduct of scattered individuals, or even bands of men, who disturb order within the state, and the civil dissensions which may, from time to time, on great questions, agitate the several communities which compose a great Empire. It looks to me to be narrow and pedantic, to apply the ordinary ideas of criminal justice to this great public contest. I do not know the method of drawing up an indictment against an whole people. . . . I am not ripe to pass sentence on the gravest public bodies, entrusted with magistracies of great authority and dignity, and charged with

* Letter of September 6, 1851.

† Lord Acton, "Freedom in Christianity."

‡ Charles Francis Adams, "Trans-Atlantic Historical Solidarity."

the safety of their fellow-citizens, upon the very same title that I am. I really think, that for wise men, this is not judicious; for sober men, not decent; for minds tinctured with humanity, not mild and merciful." *

If these principles were correct and admirable in 1775 for some two or three million citizens, how much more forcible should they have been in 1860, as applied to the *eleven* million inhabitants of the Southern States? If they were correct as regards Colonists, undeniably subjects of Great Britain, and without claim to separate political existence, how much more strongly did the words, "gravest public bodies," etc., apply to States sovereign in themselves, and fully organized for independent political existence?

Their full recognition means

"peace. Not peace through the medium of war; not peace to be hunted through the labyrinth of intricate and endless negotiations; not peace to arise out of universal discord, fomented, from principle, in all parts of the Empire; not peace to depend on the juridical determination of perplexing questions; or the precise marking the shadowy boundaries of a complex government. It is simple peace; sought in its natural course, and its ordinary haunts. It is peace sought in the spirit of peace; and laid in principles purely pacific." †

APPENDIX 34A

(II Page 299)

"MAJORITIES and their rights are creatures of social compact, and not endowed by nature with political power. They are compounded of men, excluding women; of adults, excluding minors; of landholders, excluding those who have no land; and in a multitude of ways. However compounded, they are

* Burke's "Speech on the Conciliation of the Colonies," 1775.

† *Ibid.*

a social being, and no social duty can accrue to any majority, but to one established by social compact, because no other majority exists possessed of any political rights. . . . *An appeal by the representative from the organized majority, to an ideal disorganized majority, is therefore a violation of the duties of agency.*" *

Mr. Madison, in his letter of March 15, 1833, to Mr. Webster, using much the language adapted by Mr. Lincoln to majorities, says:

"It must not be forgotten, that compact, express or implied is the vital principle of free Governments as contradistinguished from Governments not free; and that a revolt against this principle leaves no choice but between anarchy and despotism." ^{34A1}

Without those "constitutional checks and limitations," which prevent the majority from changing too easily, no form of government could be more disastrous or tyrannical than a democracy. This has been amply pointed out by publicists, and was well understood by the statesmen of the Constitutional epoch.

"There are two things which are often treated as if they were identical, which are as far apart as any two things in the field of political philosophy can be: (1) That every one should be left to do as he likes, so far as possible, without any other social restraints than such as are unavoidable for the peace and order of society. (2) That the people should be allowed to carry out their will without any restraint from constitutional institutions. The former means that each should have his own way with his own interests; the latter, that any faction which for the time is uppermost should have its own way with all the rest." †

"Il n'y a point de mot qui ait reçu plus de différentes significations, et qui ait frappé les esprits de tant de manières, que

* John Taylor, of Caroline, "Inquiry into the Principles and Policy of the Government of the United States," p. 415; 1814. Italics by B. S.

† William Graham Sumner, "State Interference," Sumner's "War, and Other Essays."

celui de *liberté*. . . . Enfin comme, dans une république, on n'a pas toujours devant les yeux, et d'une manière si présente, les instruments des maux dont on se plaint, et que même les lois paraissent y parler plus et les exécuteurs de la loi y parler moins, on la place ordinairement dans les républiques, et on l'a exclue des monarchies. Enfin, comme dans les démocraties le peuple paraît à peu près faire ce qu'il veut, on a mis la liberté dans ces sortes de gouvernements, et on a confondu le pouvoir du peuple avec la liberté du peuple." . . .*

"Liberty has not unfrequently been defined as consisting in the rule of the majority, or it has been said, where the people rule there is liberty. The rule of the majority, of itself, indicates the power of a certain body, but power is not liberty. Suppose the majority bid you drink hemlock, is there liberty for you? Or suppose the majority give away liberty, and establish a despot? We might say with greater truth, that where the minority is protected although the majority rule, there, probably, liberty exists. But in this latter case it is the protection, or in other words, rights beyond the reach of the majority which constitutes liberty, not the power of the majority." †

"The market democracy is irreconcilable with liberty as we love it. It is absolutism which exists wherever power, unmitigated, undivided and unchecked, is in the hands of any one or of any body of men. It is the opposite of liberty. The people, which means nothing more than an aggregate of men, require fundamental laws of restraint, as much as each component individual does. . . . When the Athenians, trying the unfortunate generals after the battle of Argenusæ, were reminded that they acted in direct contradiction to the laws, they exclaimed that they were the people; they made the laws, why should they not have the privilege of disregarding them?" ‡

"Let the reader also remember that, if it be thus important to abridge the power of government to interfere with free communion, it is at least equally important that no person or

* Montesquieu, *De l'Esprit des Lois*. Book 11, Chap. 2.

† F. Lieber, "Civil Liberty," pp. 41, 42; Phila., 1853.

‡ *Ibid.*, pp. 184, 185.

number of men interfere, in any manner, with this sacred right. Oppression does not come from government or official bodies alone. The worst oppression is of a social character, or by a multitude." *

"Anglican self-government differs in principle from the sejunction into which ultimately the government of the Netherlands lapsed; and it is equally far from popular absolutism, in which the majority is the absolute despot. The majority may shift, indeed, in popular absolutism, but the principle does not, and the whole can only be called a mutual tyrannizing society, not a self-government. An American orator of note has lately called self-government, a people sitting in committee of the whole. It is a happy expression of what he conceives self-government to be. We understand at once what he means; but what he means is the Athenian market democracy, in its worst time, or as a French writer has expressed it, *Le peuple-empereur*, the people-despot. It is, in fact, one of the opposites of self-government, as much so as Napoleon the First expressed another opposite in his favorite: 'Everything for the people, nothing by the people.' Self-government means: Everything for the people, and by the people, considered as the totality of organic institutions, constantly evolving in their character, as all organic life is, but not a dictatorial multitude. Dictating is the rule of the army, not of liberty; it is the destruction of individuality. But liberty, as we have seen, consists in a great measure in protection of individuality." †

"But for those who were beaten in the vote there was no redress. The law did not check the triumph of majorities or rescue the minorities from the dire penalty of having been outnumbered. . . . It is bad to be oppressed by a minority, but it is worse to be oppressed by a majority. For there is a reserve of latent power in the masses which, if it is called into play, the minority can seldom resist. But from the absolute will of an entire people there is no appeal, no refuge . . . in this way the emancipated people of Athens became a tyrant;

* F. Lieber, "Civil Liberty," p. 110.

† *Ibid.*, p. 271.

and their government, the pioneer of European freedom, stands condemned with a terrible unanimity by all the wisest of the ancients. . . . The most certain test by which we judge whether a country is really free is the amount of security enjoyed by minorities. . . .

"When the absolute sway of numbers had endured for near a quarter of a century, nothing but bare existence was left for the State to lose; and the Athenians, wearied and despondent, confessed the true cause of their ruin. They understood that for liberty, justice, and equal laws, it is as necessary that Democracy should restrain itself as it had been that it should restrain the oligarchy . . . The repentance of the Athenians came too late to save the Republic. But the lesson of their experience endures for all time, for it teaches that government by the whole people, being the government of the most numerous and most powerful class, is an evil of the same nature as unmixed monarchy, and requires, for nearly the same reasons, institutions that shall protect it against itself, and shall uphold the permanent reign of law against arbitrary revolutions of opinion." *

It was against this danger in particular that Patrick Henry led the powerful opposition in the Virginia Ratifying Convention. And it was one which had not escaped notice in the Federal Convention.

"The gentleman (Mr. Sherman) has admitted that, in a very small state, faction and oppression would prevail. It was to be inferred, then, that wherever these prevailed, the state was too small. Had they not prevailed in the largest as well as the smallest, though less than in the smallest? And were we not thence admonished to enlarge the sphere as far as the nature of government would admit? This was the only defence against the inconvenience of democracy consistent with the democratic form of government. All civilized societies would be divided into different sects, factions, and interests, as they happened to consist of rich and poor, debtors and creditors, the landed, the manufacturing, the commercial interests,

* Lord Acton, "Freedom in Antiquity."

the inhabitants of this district or that district, the followers of this political leader or that political leader, the disciples of this religious sect or that religious sect. In all cases where a majority are united by a common interest or passion, the rights of the minority are in danger. What motives are to restrain them? A prudent regard to the maxim, that honesty is the best policy, is found, by experience, to be as little regarded by the bodies of men as by individuals. Respect for character is always diminished in proportion to the number among whom the blame or praise is to be divided. Conscience—the only restraining tie—is known to be inadequate in individuals; in large numbers, little is to be expected from it. Besides religion itself may become a motive to persecution and oppression. These observations are verified by the histories of every country, ancient and modern . . . Those governments only, which provide checks, which limit and restrain within proper bounds the power of the majority, have had a prolonged existence, and been distinguished for virtue, power and happiness. Constitutional governments, and the government of a majority, are utterly incompatible, it being the sole purpose of a constitution to impose limitations and checks upon the majority. An unchecked majority, is a despotism—and government is free, and will be permanent in proportion to the number, complexity and efficiency of the checks, by which its powers are controlled. . . . The lesson we are to draw from the whole is, that, where a majority are united by a common sentiment, and have an opportunity, the rights of the minor party become insecure. In a republican government, the majority, if united, have always an opportunity. The only remedy is, to enlarge the sphere, and thereby divide the community into so great a number of interests and parties, that, in the first place, a majority will not be likely, at the same moment, to have a common interest separate from that of the whole, or of the minority; and, in the second place, that, in case they should have such an interest, they may not be so apt to unite in the pursuit of it. It was incumbent on us, then, to try this remedy, and, with that view, to frame a republican

system on such a scale, and in such a form, as will control all the evils which have been experienced." *

"It is of the greatest importance in a republic not only to guard society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure. . . . In a society under the forms of which, the stronger faction can readily unite and oppress the weaker, anarchy can be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger." †

"If the representatives of the people betray their constituents, there is then no resource left but in the exertion of that original right of self-defence, which is paramount to all positive forms of government; and which, against the usurpation of the national rulers, may be exerted with an infinitely better prospect of success, than against those of the rulers of an individual state. In a single state, if the persons intrusted with supreme power become usurpers, the different parcels, subdivisions, or districts, of which it consists, having no distinct government in each, can take no regular measures for defence. The citizens must rush tumultuously to arms, without concert, without system, without resource; except in their courage and despair. The usurpers, clothed with the forms of legal authority, can too often crush the opposition in embryo. The smaller the extent of territory, the more difficult will it be for the people to form a regular, or systematic plan of opposition; and the more easy will it be to defeat their early efforts. Intelligence can be more speedily obtained of their preparations and movements; and the military force in the possession of the usurpers, can be more rapidly directed against the part where the opposition has begun. In this situation, there must be a peculiar coincidence of circumstances, to ensure success to the popular resistance.

"The obstacles to usurpation, and the facilities of resistance,

* Madison, "Debates in the Federal Convention," June 6, 1787.

† Hamilton, "The Federalist," No. 51.

increase with the increased extent of the state; provided the citizens understand their rights, and are disposed to defend them. The natural strength of the people in a large community, in proportion to the artificial strength of the government, is greater than in a small; and of course more competent to a struggle with the attempts of the government to establish a tyranny. But in a confederacy, the people, without exaggeration, may be said to be entirely the masters of their own fate. Power being almost always the rival of power; the general government will, at all times, stand ready to check the usurpations of the state governments; and these will have the same disposition towards the general government. The people, by throwing themselves into either scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other, as the instrument of redress. How wise will it be in them, by cherishing the union, to preserve to themselves an advantage which can never be too highly prized!

"It may safely be received as an axiom in our political system, that the state governments will, in all possible contingencies, afford complete security against invasions of the public liberty by the national authority. Projects of usurpation cannot be masked under pretences, so likely to escape the penetration of select bodies of men, as of the people at large. The legislatures will have better means of information; they can discover the danger at a distance; and possessing all the organs of civil power, and the confidence of the people, they can at once adopt a regular plan of opposition, in which they can combine all the resources of the community. They can readily communicate with each other in the different states; and unite their common forces, for the protection of their common liberty." *

The conception of the Constitution thus announced, by these two of its most prominent advocates, shows the substantial accuracy of a later writer:

"But it is not only republicanism that forms one of the prominent features of American liberty, it is representative

* "The Federalist," No. 28, by Alexander Hamilton.

republicanism and the principle of confederation or federalism, which must be added, in order to express this principle correctly. We do not only consider the representative principle necessary in all our states in their military character, but the framers of our constitution boldly conceived a federal republic, or the application of the representative principle with its two houses to a confederacy. It was the first instance in history . . . It is the chief American contribution to the common treasure of political civilization. It is that by which America will chiefly influence other parts of the world. Already are voices heard in Australia for a representative federal republic like ours. Switzerland, so far as she has of late reformed her federal constitution, has done so in avowed imitation of the federal pact of our Union. I consider the mixture of wisdom and daring, shown in the framing of our constitution, as one of the most remarkable, and one of the rarest in all history." *

The benefits of such a form of government are concisely stated by an able defender of that of the United States :

"The nations which have a federal existence, even those which, without having divided the sovereignty, possess an aristocracy, or who enjoy provincial liberties deeply rooted in their traditions—these nations are able to exist a long time with a feeble government, and even to support, for a certain period, the complete absence of a government. Each part of the people has its own life, which permits society to support itself for some time when the general life is suspended. But are we one of those nations? Have we not centralized all matters, and thus created of all governments that which, indeed, it is easiest to upset, but with which it is at the same time the most difficult to dispense for a moment†" †

The statement of South Carolina (*i. e.*, of Mr. Calhoun), laid down as general principles for its action in 1829, etc., is then in harmony with these utterances (part of it indeed being

* Francis Lieber, "Civil Liberty and Self-Government," Vol. I, p. 279; 1853.

† De Tocqueville, "Report to the National Assembly of France in 1851." This translation is from Francis Lieber's "On Civil Liberty and Self-Government," the original not being at hand.

in the very words of Mr. Madison), and with the teaching of history:

"Not so with the other and greater danger. Though it exists in all associations, the law, the courts, and the government itself, are checks to its extreme abuse in most cases of private and subordinate companies, which prevents them from displaying their real tendency. But let it be supposed that there was no paramount authority, no court, no government to control, what sober individual, who intended to act honestly, would place his property in joint stock with any number of individuals however respectable, to be disposed of by the unchecked will of the majority, whether acting in a body as stockholders, or through representation by a direction? Who does not see, that sooner or later, a major and a minor interest would spring up, and that the former would in a short time monopolize all the advantages of the concern?

"And what is government itself but a joint stock company, which comprehends every interest, and which as there can be no higher power to restrain its natural operation, if not checked by its peculiar organization, must follow the same law? The actual condition of man in every country at this and all preceding periods, attests the truth of the remark. No government based on the naked principle, that the majority ought to govern, however true the maxim in its proper sense and under proper restrictions, ever preserved its liberty, even for a single generation. The history of all has been the same, injustice, violence and anarchy, succeeded by the government of one, or a few, under which the people seek refuge, from the more oppressive despotism of the majority. Those governments only, which provide checks, which limit and restrain within proper bounds the power of the majority, have had a prolonged existence, and been distinguished for virtue, power and happiness. Constitutional government, and the government of a majority, are utterly incompatible, it being the sole purpose of a constitution to impose limitations and checks upon the majority. An unchecked majority, is a despotism—and government is free, and will be permanent in proportion to

the number, complexity and efficiency of the checks, by which its powers are controlled." *

If Mr. Lincoln's doctrine of the necessary and unchecked omnipotence of a majority is granted, how may the conclusions of Mr. Calhoun be evaded? that "Stripped of all its covering, the naked question is, whether ours is a federal or a consolidated government; a constitutional or absolute one; a government resting ultimately on the solid basis of the sovereignty of the States or on the unrestrained will of a majority; a form of government, as in all other unlimited ones, in which injustice, and violence, and force must finally prevail. Let it never be forgotten that, where the majority rules without restriction, the minority is the subject; and that, if we should absurdly attribute to the former, the exclusive right of construing the Constitution, there would be, in fact, between the sovereign and subject, under such a government, no Constitution, or, at least, nothing deserving the name, or serving the legitimate object of so sacred an instrument." †

"But no one I think, can follow American history without perceiving how frequently and seriously the democratic principle has undermined this first condition of true freedom and progress. As Mill justly says, the tyranny of the majority is not only shown in tyrannical laws. Sometimes it is shown in an assumed power to dispense with all laws which run counter to the popular opinion of the hour." ‡

"The opinion, 'that the mode prescribed for amending the constitution of the United States, does not pursue the principles of democracy, self government or majority,' is met and contested by the arguments used to explode a similar objection to the structure of the senate. States being considered as entitled to equal rights, and the people of the United States having rights also independent of state governments, it was necessary to obtain the consent of all these rights to amendments, in pursuance of the principles said to be violated by the mode

* "Exposition and Protest . . ." by the Special Committee of South Carolina, Columbia, 1829.

† Calhoun, "Works," Vol. VI, p. 75.

‡ Lecky, "Liberty and Democracy," Vol. I, p. 778; N. Y., 1896.

adopted. Amendments, inflicted by a majority of the people and a minority of states, or by a majority of states and a minority of people, would have violated the natural or political equality, either of individuals as members of the general national society, or of the same individuals, as members of the state national societies. To violate neither was the object of the constitution, and therefore a mode of amendment, sanctioned by the consent of a majority of both of these free, equal and independent parties to the union, was adopted.

"The people of the states, treated and united as independent of each other, surrendered a portion of their independent rights, into a common treasury, and retained another portion. The contract derives its force, not from the consent of a majority of states, but from the separate consent of each. If the moment the contract was signed by these independent parties, it had been subject to modification by a majority of states, the common treasury of rights, might have been plundered; if by a majority of people, the state rights retained, might have been invaded. The first would have erected an aristocracy, by making a majority of states and a minority of people, masters of the majority of people of the United States. The second would be the case of a minority of the strongest men joined together after forming a society, to compel a majority of weaker men, to submit to such alterations as they chose to make. The destruction of popular government, was not the motive for the confederation. The federal and popular expressions abounding in the constitution, prove it to be a compact, both federal and popular, requiring the happy expedient of securing a concurrence both of the federal and popular will, to amendments for self preservation; had popular will dictated these amendments, state self government, the federal ingredient of the constitution, would have been destroyed; and had federal will dictated them, national self government, the popular ingredient of the constitution, would have been also destroyed." *

"Every principle, bad or good, drawn from the moral quali-

* John Taylor, of Caroline, "Inquiry into the Principles and Policy of the Government of the U. S.," pp. 511-512; 1814.

ties of an individual, applies to a multitude. A power making one man a despot, will make despots of a party of men; the only difference being, that one species of despotism resembles a scorching fire; the other, a consuming conflagration. Parties clothed with evil or despotick powers, destroy free governments with a rage and rapidity far outstripping the capacity of individual tyrants, because many men can do more mischief than one. This fact demonstrates the incapacity of the numerical analysis for informing us whether a government is free or despotick, and explodes the hideous doctrine 'that the will of a majority can do no wrong,' under which parties, in imitation of kings, often endeavour to hide atrocious legal violations of good moral principles. Many men can even do more wrong to one or a few, than one or a few can do to many. This analysis is still more defective as a criterion of good or bad laws, because those of its best form are not necessarily good, and no commixture of its several forms can make arbitrary or fraudulent laws, free or just.

"The principle 'that a government and its laws must be of the same moral nature to subsist together,' furnishes the only existing security for the preservation both of a free and an arbitrary form of government. Monarchy cannot subsist upon republican laws, nor a republic upon monarchical. The numerical analysis can inform us, whether we are governed by one, a few, or many persons, but its whole stock of knowledge is expended in the performance of this paltry office, and it is utterly unable to give us any instruction as to the mode of preserving the selected form of government. But an analysis founded in moral principles, furnishes nations with constitutional restraints upon governments, and with perpetual sentinels faithfully warning them of the approach of their worst foes; bad laws. It transfers popular attention from the persons composing the numerical analysis, to the principles by which it is itself composed; and settles a wise veneration or a just hatred upon the good and bad divisions of these principles, instead of that ridiculous veneration for a president and a congress, a king and a parliament, or an emperor and a senate, which never discloses the approach of a single foe to

liberty. A moral analysis alone can teach nations the only mode of sustaining a free government. It can detect attempts to destroy our moral constitutional principles of a division of power between the people and the government, or between the general and state governments, by political or civil laws. And it can keep us attentive to the fact, that a power in a government of any form, to deal out wealth and poverty by law, overturns liberty universally; because it is a power by which a nation is infallibly corrupted; and the legislature, whose laws caused the corruption, is at length forced by the national depravity, to abridge the liberty of the people; or an usurper makes it a strong argument, even with good men, for erecting a despotick government. A power in Congress, for instance, of influencing the wealth or poverty of states by taxing exports and making roads or canals; or of individuals, by charters; would be used by successive parties for self preservation, with an activity, by which government would exchange the duty of protecting for the privilege of regulating property. The alternative of receiving or yielding the golden fleece, according to the will of these parties, would suddenly excite an equal degree of baleful activity among the people, to gain the one and to avoid the other; and soon overturn the whole catalogue of moral principles, necessary for the preservation of a free form of government. In whatever numerical class a government is arranged, a power of advancing the wealth of one part of the nation, by civil laws, will be used by its successive administrators to obtain a corrupt influence, wholly inconsistent with any good moral principles interwoven in a constitution, and certainly destructive of them." *

"Will popular favour alone ensure political virtue, when it may be stolen? The theft may be more easily perpetrated in the United States than in other countries, by enlisting geographical interests as accomplices. Even where these powerful associates do not exist, and under republics, as at Athens, the people have been used like the figures upon a chess-board, merely to decide the fortune of political gamblers; but

* John Taylor, of Caroline, "Inquiry into the Principles and Policy of the Government of the U. S.," pp. 581-583; 1814.

where these can play with geographical interests and prepossession, an augmentation of the danger requires peculiar precautions. That chiefly relied upon by the constitution, and singularly distinguishable from other divisions of power, which have been unsuccessful under more manageable circumstances, is the mutual check between the state and federal governments; and if this is lost, the subjugation of the people to some despotick form of government, will be more probable here, than in countries where equivalent auxiliaries for political vice do not exist." *

"If the makebate construction should be able to drive into the constitution the anomaly of subjecting state powers to an unsympathizing federal majority, legislative or judicial, our government, from being the best, might become the worst in the world; because one nation is the most inexorable of all tyrants over another; and state nations, by their representatives in Congress, would become the tyrants over other state nations, by being able to oppress them for their own emolument. I know not whether this, or that of an absolute monarch, would be the worst species of tyranny." †

"The evil however has arisen from a confidence inspired by the numerical analysis. By deluding us to expect from men, that which principles alone can yield, namely, a free government, we are induced to neglect the application of principles to laws. A numerical classification of men, triple, decimal, or centuriate, as imperfectly ascertains their moral qualities, as one drawn from size, meat, bone or hair. An analysis of sheep, founded in moral qualities, is equivalent to the numerical analysis of government; by the first, we can never discover whether we have good sheep; nor by the second, whether we have a good government or good laws. Had each quarter of the globe adopted a different member of the numerical analysis, supposing it to comprise monarchy, aristocracy, democracy, and a mixture of the three, the whole world might still have suffered oppression. Crimes perpetrated individu-

* John Taylor, of Caroline, "New Views on the Constitution," p. 258; 1823.

† *Ibid.*, p. 286; 1823.

ally or collectively are still crimes; but nations led astray by the numerical analysis, having selected one of its members for their form of government, conclude that they have attained to the utmost degree of political perfection, and cannot do better than to bear its crimes as they do a drought. Hence a disciple of the most republican member of the numerical analysis, is induced to bear, defend and applaud the crimes of his selected form, an abhorrence of which when committed by other forms, caused his preference; and hence political parties are equally strenuous for the justification or correction of the same abuses, as they happen to proceed from their own or the leaders of their adversary. Both evils arise from the want of a worthy object on which to bestow our zeal. Having been taught to believe, that the numerical analysis presents us with a complete political pantheon, we are compelled to pay our adoration to some of its deities. Yet we never extend the blindness we attach to the object of our own worship, to the objects selected by others to receive a similar offering. A republic sees very plainly oppressions committed by monarchy and aristocracy, and these two, those committed by republics; but whilst each sees the vices of the other members of the numerical analysis, the blindness occasioned by the want of a moral analysis, tolerates the same vices in itself. If we would consider, that we discover the vices of the rejected forms of government, by bringing them to trial, without favour or affection, before a jury of good moral principles, we should instantly discern that the same tribunal would detect the vices of the government we have selected; and that an analysis, similar to that formed in our own minds to try supposed culprits, might be perfected into a complete capacity for rooting up as they are planted, those legal scions, which otherwise never fail to grow, until they draw to themselves all the nourishment of a free government.

"It is necessary to illustrate these observations by the aid of a familiar fact. The two parties, called republican and federal, have hitherto undergone but one revolution. Yet each when in power, preached Filmer's old doctrine of passive obedience in a new form, with considerable success; and each

out of power strenuously controverted it. The party in power asserted, that however absurd or slavish this doctrine was under other forms of the numerical analysis, the people under ours were *identified* (the new term to cog this old doctrine upon the United States) with the government; and that therefore an opposition to the government, was an opposition to the nation itself. The extraction of passive obedience, of all political principles the most slavish, out of the best member of the numerical analysis, as the extractors themselves confess, furnishes a conclusive proof of its insufficiency for teaching us how to preserve a free form of government. This identifying doctrine is exactly analogous to Agrippa's fraudulent apologue, for constituting a government the intellectual dictating head of the whole body politick, and subjecting the members to a passive obedience. It puts an end to the idea of a responsibility of the government to the nation; sameness cannot be responsible to sameness. It renders useless or impracticable the freedom of speech and of the press. It converts the representative into the principle. It destroys the division of power between the people and the government, as being themselves indivisible. And in short it is inconsistent with every principle by which politicians and philosophers have hitherto defined a free government. This ingenious doctrine of identity for justifying tyranny in fact, because a government is free in form; and for defeating the responsibility of the government to the people, because the constitution was calculated to produce it; asserted and denied by both our parties, demonstrates that opinions fluctuate with power." *

"As it is a political axiom, that great concentrated power begets popular commotion, and that popular commotion begets great concentrated power, the constitution relied upon a sounder check to prevent both, in the state governments. There cannot be a more direct advance towards monarchy, than the dissolution of the orderly and organized control of the state governments, and an exclusive dependence upon the control of the people; because the very first popular com-

* John Taylor, of Caroline, "Inquiry into the Principles and Policy of the Government of the U. S.," pp. 651-654; 1814.

motion excited by an oppressive or partial law, would furnish a pretext for its introduction. To talk, therefore, of an American people, as sufficiently able and willing to act in concert, so as to furnish a security against the effects of a supreme concentrated power, and to render the mutual control of the state and federal departments unnecessary for the preservation of liberty, to my mind conveys the idea of great ignorance or of great ambition.

"The artifice of destroying the rights of the people, under the mask of vindicating them, is as old as government itself. If the people of the United States should constitute themselves into one nation, the question would still occur, which was the best mode for preserving liberty, that of dividing or concentrating the powers of government? The election would lie, in fact, between a disorderly and lawless resistance of mobs, and the orderly and constitutional resistance of state governments. Suppose a majority on one side of the United States, to oppress a minority on the other. Would this probable and meditated evil be best controlled by mobs or state governments? The *Federalist* eulogises the latter mode of control, as the distinguishing superiority of our system for preserving the rights of the people. A sufficient mode of preventing geographical districts from being oppressed, must be found in all extensive countries, or they will be oppressed. Is it better to intrust this indispensable office to mobs or self-constituted combinations, than to organized departments? Which will act with most knowledge, discretion, legality, and effect, in maintaining the rights of the people, mobs or state governments? In a country so extensive as the United States, we must have one or the other, to countervail the propensity of great concentrated power to oppress, from ambition, avarice, or local ignorance; and the state governments exposed to the control of the people in each state, and to the power of three-fourths of the states to amend the constitution, is infinitely preferable to insurrections, exposed only to control of physical force." *

* John Taylor, of Caroline, "New Views on the Constitution," pp. 187-188; 1823.

"The house of representatives alone, is inert, and the influence which reaches it is not that of a consolidated people, but of separate states; and therefore a responsibility was contrived for the federal government, to prevent a majority of people inhabiting a minority of states, from oppressing a majority of states. How can it be contended that the constitution relied upon a responsibility to an American people for its faithful observance, when it abounds with precautions to prevent a majority from using its influence to destroy the moral equality of the states? It is at least strange doctrine to states, which can never use population as a passport to geographical power." *

"In having the honor to address you for the first time in my judicial capacity, I do it with particular satisfaction at a period of so much dignity and prosperity to the United States. Perhaps in no country in the world have been within so few years exemplified such awful and important lessons. We have been taught, not only the value of Liberty, but what it was much more difficult to learn, that liberty itself, in order to be truly enjoyed, must submit to reasonable and considerate restraints. The unbounded liberty of the strongest man is tyranny to the weakest: The unlimited sway of a majority is oppression to the minority:" †

"I have not lived so short a time in the State, nor with so little interest in its concerns, as to forget the extreme anxiety with which all of us were agitated in forming the constitution, a constitution which we considered as the fundamental basis of our Government, unalterable, but by the same high power which established it, and therefore to be deliberated on with the greatest caution, because if it contained any evil principle, the government formed under it must be annihilated before the evil could be corrected. It was, of course, to be considered how to impose restrictions on the legislature, that might still leave it free to all useful purposes, but at the same time guard against the abuse of unlimited power, which was

* John Taylor, of Caroline, "New Views on the Constitution," p. 194; 1823.

† Charge to Grand Jury, 1792, "Life and Correspondence of James Iredell," by G. J. McRee, Vol. II, p. 365; 1858.

not to be trusted, without the most imminent danger, to any man or body of men on earth. We had not only been sickened and disgusted for years with the high and almost impious language from Great Britain, of the omnipotent power of the British Parliament, but had severely smarted under its effects. We felt in all its rigor the mischiefs of an absolute and unbounded authority, claimed by so weak a creature as man, and should have been guilty of the basest breach of trust, as well as the grossest folly, if in the same moment when we spurned at the *insolent despotism* of Great Britain, we had established a *despotic* power among ourselves. Theories were nothing to us, opposed to our own severe experience. We were not ignorant of the theory of *the necessity of the legislature being absolute in all cases*, because it was the great ground of the British pretensions. But this was a mere speculative principle, which men at ease and leisure thought proper to assume. When we were at liberty to form a government as we thought best, without regard to that or any theoretical principle we did not approve of, we decisively gave our sentiments against it, being willing to run all the risks of a government to be conducted on the principles then laid as the basis of it. The instance was new in the annals of mankind. No people had ever before deliberately met for so great a purpose. Other governments have been established by chance, caprice, or mere brutal force. Ours, thank God, sprang from the deliberate voice of the people. We provided, or meant to provide (God grant our purpose may not be defeated), for the security of every individual, as well as a fluctuating majority of the people. We knew the value of liberty too well, to suffer it to depend on the capricious voice of popular favor, easily led astray by designing men, and courted for insidious purposes." *

" . . . He will not if he is a wise man, be reassured by the prevailing habit, so natural in democracies, of canonizing and almost idolising mere majorities, even when they are mainly composed of the most ignorant men, voting under all the mis-

* "Life and Correspondence of James Iredell," by G. J. McRee, Vol. II, p. 146; 1858.

leading influences of side-issues and violent class or party passions. 'The voice of the people,' as expressed at the polls, is to many politicians the sum of all wisdom, the supreme test of truth or falsehood . . . Truly indeed did Carlyle say that the superstitions to be feared in the present day are much less religious than political; and of all the forms of idolatry I know none more irrational and ignoble than this blind worship of mere numbers." *

"It . . . seems to me that the parliamentary system, when it rests on manhood suffrage, or something closely approaching to manhood suffrage, is extremely unlikely to be permanent. This was evidently the opinion of Tocqueville, who was strongly persuaded that the natural result of democracy was a highly concentrated, enervating, but mild despotism." †

"What is called the 'one-man power' is a very natural product of democracy," etc. ‡

"The tyranny of majorities is, of all forms of tyranny, that which, in the conditions of modern life, is most to be feared." §

Mr. Lecky's idea of the form which this tyranny is likely to take is much the same as that of Mr. Sumner. || And his idea of the duties of government is identical with the earlier American ideas; *e. g.*:

"If we ask what are the chief services that a Government can render to national morals . . . some . . . will place the greatest stress on the establishment by the State of the religion which they believe to be true; . . . on laws restraining private vices . . . To me . . . the . . . greatest service a Government can render to morals seems to be the maintenance of a social organization . . . in which honesty, industry, providence . . . naturally reap their rewards, and the opposite vices their punishments." ¶

* Lecky, "Democracy and Liberty," Vol. I, p. 223; N. Y., 1896.

† *Ibid.*, Vol. I, p. 300.

‡ *Ibid.*, Vol. I, p. 148.

§ *Ibid.*, Vol. I, p. 376.

|| *Vide*, Appendix 47.

¶ Lecky, "Democracy and Liberty," Vol. I, p. 205.

APPENDIX 34A¹*(II Page 304)*

ANOTHER exposition by Mr. Madison is appended for purposes of comparison.

"DEAR SIR,—You justly take alarm at the new doctrine that a majority Govt. is of all other Govts. the most oppressive. The doctrine strikes at the root of Republicanism, and if pursued into its consequences, must terminate in absolute monarchy, with a standing military force; such alone being impartial between its subjects, and alone capable of overpowering majorities as well as minorities.

"But it is said that a majority Govt. is dangerous only where there is a difference in the interest of the classes or sections composing the community; that this difference will generally be greatest in communities of the greatest extent; and that such is the extent of the U. S. and the discordance of interests in them, that a majority cannot be trusted with power over a minority.

"Formerly, the opinion prevailed that a Republican Govt. was in its nature limited to a small sphere; and was in its true character only when the sphere was so small that the people could, in a body, exercise the Govt. over themselves.

"The history of the ancient Republics, and those of a more modern date, had demonstrated the evils incident to popular assemblies, so quickly formed, so susceptible of contagious passions, so exposed to the misguidance of eloquence & ambitious leaders; and so apt to be tempted by the facility of forming interested majorities, into measures unjust and oppressive to the minor parties.

"The introduction of the representative principle into modern Govts., particularly of G. B. and her colonial offsprings, had shown the practicability of popular Govts. in a larger sphere, and that the enlargement of the sphere was a cure for

many of the evils inseparable from the popular forms in small communities.

"It remained for the people of the U. S., by combining a federal with a republican organization, to enlarge still more the sphere of representative Govt. and by convenient partitions & distributions of power, to provide the better for internal justice & order, whilst it afforded the best protection agst. external dangers.

"Experience & reflection may be said not only to have exploded the old error, that republ. Govts. could only exist within a small compass, but to have established the important truth, that as representative Govts. are necessary substitutes for popular assemblages; so an association of free communities, each possessing a responsible Govt. under a collective authority also responsible, by enlarging the practicable sphere of popular governments, promises a consummation of all the reasonable hopes of the patrons of free Govt.

"It was long since observed by Montesquieu, has been often repeated since, and, may it not be added, illustrated within the U. S. that in a confederal system, if one of its members happens to stray into pernicious measures, it will be reclaimed by the frowns & the good examples of the others, before the evil example will have infected the others.

"But whatever opinions may be formed on the general subjects of confederal systems, or the interpretation of our own, every friend to Republican Govt. ought to raise his voice agst. the sweeping denunciation of majority Govts. as the most tyrannical and intolerable of all Govts.

"The Patrons of this new heresy will attempt in vain to mask its anti-republicanism under a contrast between the extent and the discordant interests of the Union, and the limited dimensions and sameness of interests within its members. Passing by the great extent of some of the States, and the fact that these cannot be charged with more unjust & oppressive majorities than the smaller States, it may be observed that the extent of the Union, divided as the powers of Govt. are between it and its members, is found to be within the compass of a successful administration of all the departments of Govt.

notwithstanding the objections & anticipations founded on its extent when the Constitution was submitted to the people. It is true that the sphere of action has been and will be not a little enlarged by the territories embraced by the Union. But it will not be denied, that the improvements already made in internal navigation by canals & steamboats, and in turnpikes & railroads, have virtually brought the most distant parts of the Union, in its present extent, much closer together than they were at the date of the Federal Constitution. It is not too much to say, that the facility and quickness of intercommunication throughout the Union is greater now than it formerly was between the remote parts of the State of Virginia.

"But if majority Govts. as such, are so formidable, look at the scope for abuses of their power within the individual States, in their division into creditors & debtors, in the distribution of taxes, in the conflicting interests, whether real or supposed, of different parts of the State, in the case of improving roads, cutting canals, &c., to say nothing of many other sources of discordant interests or of party contests, which exist or wd. arise if the States were separated from each other. It seems to be forgotten, that the abuses committed within the individual States previous to the present Constitution, by interested or misguided majorities, were among the prominent causes of its adoption, and particularly led to the provision contained in it which prohibits paper emissions and the violations of contracts, and which gives an appellate supremacy to the judicial department of the U. S. Those who framed and ratified the Constitution believed that as power was less likely to be abused by majorities in representative Govts. than in democracies, where the people assembled in mass, and less likely in the larger than in the smaller communities, under a representative Govt. inferred also, that by dividing the powers of Govt. and thereby enlarging the practicable sphere of government, unjust majorities would be formed with still more difficulty, and be therefore the less to be dreaded, and whatever may have been the just complaints of unequal laws and sectional partialities under the majority

Govt. of the U. S., it may be confidently observed that the abuses have been less frequent and less palpable than those which disfigured the administrations of the State Govts. while all the effective powers of sovereignty were separately exercised by them. If bargaining interests and views have created majorities under the federal system, what, it may be asked, was the case in this respect antecedent to this system, and what but for this would now be the case in the State Govts. It has been said that all Govt. is an evil. It wd. be more proper to say that the necessity of any Govt. is a misfortune. This necessity however exists; and the problem to be solved is, not what form of Govt. is perfect, but which of the forms is least imperfect; and here the general question must be between a republican Governmt. in which the majority rule the minority, and a Govt. in which a lesser number or the least number rule the majority. If the republican form is, as all of us agree, to be preferred, the final question must be, what is the structure of it that will best guard ag. precipitate counsels and factious combinations for unjust purposes, without a sacrifice of the fundamental principle of Republicanism. Those who denounce majority Govts. altogether because they may have an interest in abusing their power, denounce at the same time all Republican Govt., and must maintain that minority governments would feel less of the bias of interest or the seductions of power.

“As a source of discordant interests within particular States, reference may be made to the diversity in the applications of agricultural labour, more or less visible in all of them. Take for example Virginia herself. Her products for market are in one district Indian corn and cotton; in another, chiefly tobacco; in another, tobo. and wheat; in another, chiefly wheat, rye, and live stock. This diversity of agricultural interests, though greater in Virga. than elsewhere, prevails in different degrees within most of the States.

“Virga. is a striking example also of a diversity of interests, real or supposed, in the great and agitating subjects of roads and water communications, the improvements of which are little needed in some parts of the State, tho’ of the greatest

importance in others; and in the parts needing them much disagreement exists as to the times, modes, & the degrees of the public patronage; leaving room for an abuse of power by majorities, and for majorities made up by affinities of interests, losing sight of the just & general interest.

"Even in the great distinctions of interest and of policy generated by the existence of slavery, is it much less between the Eastern & Western districts of Virginia than between the Southern & Northern sections of the Union? If proof were necessary, it would be found in the proceedings of the Virga. Convention of 1829-30, and in the Debates of her Legislature in 1830-31. Never were questions more uniformly or more tenaciously decided between the North & South in Congs., than they were on those occasions between the West & the East of Virginia.

"But let us bring this question to the test of the tariff itself [out of which it has grown,] and under the influences of which it has been inculcated, that a permanent incompatibility of interests exists in the regulations of foreign commerce between the agricultural and the manufacturing population, rendering it unsafe for the former to be under a majority power when patronizing the latter.

"In all countries, the mass of people become, sooner or later, divided mainly into the class which raises food and raw materials, and the class which provides clothing & the other necessities and conveniences of life. As hands fail of profitable employment in the culture of the earth, they enter into the latter class. Hence, in the old world, we find the nations everywhere formed into these grand divisions, one or the other being a decided majority of the whole, and the regulations of their relative interests among the most arduous tasks of the Govt. Although the mutuality of interest in the interchanges useful to both may, in one view, be a bond of amity & union, yet when the imposition of taxes whether internal or external takes place, as it must do, the difficulty of equalizing the burden and adjusting the interests between the two classes is always more or less felt. When imposts on foreign commerce

have a protective as well as a revenue object, the task of adjustment assumes a peculiar arduousness.

"This view of the subject is exemplified in all its features by the fiscal & protective legislation of G. B. and it is worthy of special remark that there the advocates of the protective policy belong to the landed interest; though in some particulars both interests are suitors for protection agst. foreign competition.

"But so far as abuses of power are engendered by a division of a community into the agricultural & manufacturing interests and by the necessary ascendancy of one or the other as it may comprize the majority, the question to be decided is whether the danger of oppression from this source must not soon arise within the several States themselves, and render a majority Govt. as unavoidable an evil in the States individually; as it is represented to be in the States collectively.

"That Virginia must soon become manufacturing as well as agricultural, and be divided into these two great interests, is obvious & certain. Manufactures grow out of the labour not needed for agriculture, and labour will cease to be so needed or employed as its products satisfy & satiate the demands for domestic use & for foreign markets. Whatever be the abundance or fertility of the soil, it will not be cultivated when its fruits must perish on hand for want of a market. And is it not manifest that this must be henceforward more & more the case in this State particularly? The earth produces at this time as much as is called for by the home and the foreign markets; while the labouring population, notwithstanding the emigration to the West and the S. West, is fast increasing. Nor can we shut our eyes to the fact, that the rapid increase of the exports of flour & Tobo. from a new & more fertile soil will be continually lessening the demand on Virginia for her two great staples, and be forcing her, by the inability to pay for imports by exports, to provide within herself substitutes for the former.

"Under every aspect of the subject, it is clear that Virginia must be speedily a manufacturing as well as an agricultural State; that the people will be formed into the same great

classes here as elsewhere; that the case of the tariff must of course among other conflicting cases real or supposed be decided by the republican rule of majorities; and, consequently, if majority govts. as such, be the worst of Govts. those who think & say so cannot be within the pale of the republican faith. They must either join the avowed disciples of aristocracy, oligarchy or monarchy, or look for a Utopia exhibiting a perfect homogeneousness of interests, opinions & feelings nowhere yet found in civilized communities. Into how many parts must Virginia be split before the semblance of such a condition could be found in any of them? In the smallest of the fragments, there would soon be added to previous sources of discord a manufacturing and an agricultural class, with the difficulty experienced in adjusting their relative interests in the regulation of foreign commerce if any, or if none in equalising the burden of internal improvement and of taxation within them. On the supposition that these difficulties could be surmounted, how many other sources of discords to be decided by the majority would remain. Let those who doubt it consult the records of corporations of every size, such even as have the greatest apparent simplicity & identity of pursuits and interests.

"In reference to the conflicts of interests between the agricultural and manufacturing States, it is consoling anticipation that, as far as the legislative encouragements to one may not involve an actual or early compensation to the other, it will accelerate a state of things in which the conflict between them will cease and be succeeded by an interchange of the products profitable to both; converting a source of discord among the States into a new cement of the Union, and giving to the country a supply of its essential wants independent of contingencies and vicissitudes incident to foreign commerce.

"It may be objected the majority, as formed by the Constitution, may be a minority when compared with the popular majority. This is likely to be the case more or less in all elective governments. It is so in many of the States. It will always be so where property is combined with population in the election and apportionment of representation. It must be still more

the case with confederacies, in which the members, however unequal in population, have equal votes in the administration of the government. In the compound system of the United States, though much less than in mere confederacies, it also necessarily exists to a certain extent. That this departure from the rule of equality, creating a political and constitutional majority in contradistinction to a numerical majority of the people, may be abused in various degrees oppressive to the majority of the people, is certain; and in modes and degrees so oppressive as to justify ultra or anti-constitutional resorts to adequate relief is equally certain. Still the constitutional majority must be acquiesced in by the constitutional minority, while the Constitution exists. The moment that arrangement is successfully frustrated, the Constitution is at an end. The only remedy, therefore, for the oppressed minority is in the amendment of the Constitution or a subversion of the Constitution. This inference is unavoidable. While the Constitution is in force, the power created by it, whether a popular minority or majority, must be the legitimate power, and obeyed as the only alternative to the dissolution of all government. It is a favourable consideration, in the impossibility of securing in all cases a coincidence of the constitutional and numerical majority, that when the former is the minority, the existence of a numerical majority with justice on its side, and its influence on public opinion, will be a salutary control on the abuse of power by a minority constitutionally possessing it: a control generally of adequate force, where a military force, the disturber of all the ordinary movements of free governments, is not on the side of the minority.

“The result of the whole is, that we must refer to the monitory reflection that no government of human device and human administration can be perfect; that that which is the least imperfect is therefore the best government; that the abuses of all other governments have led to the preference of republican government as the best of all governments, because the least imperfect; that the vital principle of republican government is the *lex majoris partis*, the will of the majority; that if the will of a majority cannot be trusted where

there are diversified and conflicting interests, it can be trusted nowhere, because such interests exist everywhere; that if the manufacturing and agricultural interests be of all interests the most conflicting in the most important operations of government, and a majority government over them be the most intolerable of all governments, it must be as intolerable within the States as it is represented to be in the United States; and, finally, that the advocates of the doctrine, to be consistent, must reject it in the former as well as in the latter, and seek a refuge under an authority master of both." *

APPENDIX 34B

(II Page 300)

"BUT the strongest argument on this side was the doctrine of the rights of nationalities. I can well remember how the illustrious historian, Mr. Grote, whose political leanings were strongly democratic, and who, at the same time, always formed his opinions with an austere independence and integrity, was accustomed to speak on the subject, and how emphatically he dissented from the views of Mill and of a large proportion of those with whom he usually acted. He could not, he said, understand how those who had been so lately preaching in the most unqualified terms that all large bodies of men had an absolute, unimpeachable, indefeasible right to choose for themselves their form of government, and that the growing recognition of this right was one of the first conditions of progress and liberty, could support or applaud the Federal Government in imposing on the Southern States a government which they detested, and in overriding by force their evident and unquestionable desire.

"The inconsistency was real and flagrant, and the attitude of the North, and of its supporters in Europe, could only be

* "Madison MSS.," Hunt's Edition, Vol. IX, pp. 520-528.

justified on the ground that the right of nationalities was not the absolute, unlimited thing which it had been customary to assert." *

"Such considerations sufficiently show the danger of the exaggerated language on the subject of the rights of nationalities which has of late years become common. It will, indeed, be observed that most men use such language mainly in judging other nations and other policies than their own. One of the most remarkable test cases of this kind which have occurred in our generation has been that of the United States. This great nation is one of the least military as well as one of the freest and most democratic in the world, and its representative writers, and sometimes even its legislative bodies, are fond of very absolute assertions of the right of revolution and the inalienable supremacy of the popular will. . . .

"But most significant of all was the attitude assumed by the Federal Government in dealing with the secession of the South. Long before that secession some of the best observers had clearly pointed out how the influence of climate, and much more the special type of industry and character which slavery produced, had already created a profound and lasting difference between the North and the South. Both Madison and Story had foreseen that the great danger to the United States was the opposition between the Northern and Southern interests. Calhoun was so sensible of the difference that he proposed the establishment of two presidents, one for the free, and the other for the slave States, each with a vote on all national legislation. Guizot and Tocqueville had both distinctly recognised the same truth. Though language and religion were the same, and though race was not widely different, two distinct nations had grown up, clearly separated in their merits and their defects, in character, manners, aspirations, and interests.

"After the election of President Lincoln the long-impending disruption came. The Southern States proclaimed the right of nationalities, demanded their independence, and proved their earnestness and their unanimity by arguments that were far

* Lecky, "Democracy and Liberty," Vol. I, p. 488; N. Y., 1896.

more unequivocal than any doubtful plebiscite. For four long years they defended their cause on the battle-field with heroic courage, against overwhelming odds, and at the sacrifice of everything that men most desire. American and indeed European writers are accustomed to speak of the heroism of the American colonies in repudiating imperial taxation, and asserting and achieving their independence against all the force of Great Britain. But no one who looks carefully into the history of the American revolution, who observes the languor, the profound divisions, the frequent pusillanimity, the absence of all strong and unselfish enthusiasm that were displayed in great portions of the revolted colonies, and their entire dependence for success on foreign assistance, will doubt that the Southern States in the War of Secession exhibited an incomparably higher level of courage, tenacity, and self-sacrifice. No nation in the nineteenth century has maintained its nationhood with more courage and unanimity. But it was encountered with an equal tenacity, and with far greater resources, and, after a sacrifice of life unequalled in any war since the fall of Napoleon, the North succeeded in crushing the revolt and establishing its authority over the vanquished South." *

APPENDIX 34C

(II Page 300)

PERHAPS to say "nobody" is a strong statement.

"The very existence of a general and national government implies the legal power, right, and duty of maintaining its own integrity . . . It is the duty of a President to execute the laws and maintain the existing Governments. He cannot entertain any proposition for dissolution or dismemberment. He was not elected for any such purpose. *As a matter of theoretical speculation it is probably true* that if the people, with whom the whole question rests, should become tired of the present

* Lecky, "Democracy and Liberty," Vol. I, pp. 483-485; N. Y., 1896.

Government, they might change it in the manner prescribed by the Constitution." *

"I hold that in contemplation of universal law and of the Constitution, the union of these States is perpetual. Perpetuity is implied, if not expressed, in the fundamental law of all national governments. It is safe to assert that no government proper ever had a provision in its organic law for its own termination," etc.^{34C1} †

Mr. Lincoln seemingly had doubts if that majority of the people to which he appeals, or even "the people," could *practically* change the Government even in the manner thought by himself to be prescribed by the Constitution,—let alone by revolution, however "sacred."

Contradiction is even evident between Mr. Lincoln's statement that the Constitution prescribed a manner by which the Government might be changed, and his statement that "it is safe to assert that no government proper ever had a provision in its organic law for its own termination."

APPENDIX 34C¹*(II Page 335)*

UPON this point it is perhaps necessary to emphasize [what indeed should be evident from foregoing matter] that, while this discussion asserts the right of secession (not indeed a "sacred," merely a Constitutional right), it seeks not to depreciate the value of the Union: to the contrary, it looks to the acknowledgment of the right of secession as an unfortunately necessary factor in such preservation of the Union as will develop its aims of life, liberty and the pursuit of happiness.

* Lincoln, December 13, 1860, Nicolay & Hay, Vol. III, p. 248. Italics are author's.

† Lincoln, First Inaugural.

"Co-ordinate and independent powers alone, can beget mutual moderation; an unchecked supremacy uniformly inspires arrogance, and causes oppression. To defeat or weaken federal checks by a substitution of constructive national checks, is therefore not less hostile to the freedom of the states, than to the sufficiency of facts and words for establishing a federal form of government." *

Mr. Lincoln's statement is open to criticism in more than one way. He "asserts that no government proper ever had a provision in its organic law for its own termination." But the important question is, whether such a provision in reality tends towards or against the termination of the government.³⁴⁰¹⁺ Again, it was not asserted by the doctrine of Secession that this government "had a provision in its organic law for its own termination." It was asserted that such a condition necessarily arises *by the law of nations* from the manner of its formation; and was so understood by those who created it. When he says that "Perpetuity is implied, if not expressed, in the fundamental law of all national governments," it has been shown that this was not a "national government" in the sense asserted by him. Moreover, among the differences between this and all preceding governments, not the least was that this was the first based upon the people's will, and as such subject by it to continue or terminate, as was repeatedly and authoritatively asserted by its makers. Again, had perpetuity been even expressed, it would have meant but little: the Confederation precedent to the Constitution was stated to be in perpetuity, yet, at the time the Articles were entered upon, it was foreseen, as afterwards openly acknowledged, that this was a meaningless phrase,^{34c1Δ} and, in fact, they were in a few years terminated.

Perpetuity (or any similar desirable consummation in political, religious, or moral affairs) is not to be attained by enacting it. Attainable permanence seems a mean between antagonistic forces, resulting from their conflict, not from the complete success of either; whose victory quickly ensures its

* John Taylor, of Caroline, "Views on the Constitution," p. 34; 1823.

own destruction. This seems a moral law of nature, as fixed as any physical law.

So viewed, the Constitution stands between two poles, the Federal and the State governments; and it is not to be forgotten that, though less obvious (because its first effects are in the direction of consolidation), the results of the supremacy of the first would be quite as fatal to the Union as would be that of the second. Mr. Madison pointed out that

“The acquiescence of the States under infractions of the federal compact, would either beget a speedy consolidation, by precipitating the State governments into impotency and contempt; or prepare the way for a revolution, by a repetition of these infractions, until the people are roused to appear in the majesty of their strength.” *

“That the General Assembly doth also express its deep regret that a spirit has in sundry instances been manifested by the Federal Government to enlarge its powers by forced constructions of the constitutional charter which defines them; and that indications have appeared of a design to expound certain general phrases, (which, having been copied from the very limited grant of powers in the former articles of Confederation, were the less liable to be misconstrued,) so as to destroy the meaning and effect of the particular enumeration which necessarily explains and limits the general phrases, and so as to consolidate the States by degrees into one sovereignty, the obvious tendency and inevitable result of which would be to transform the present republican system of the United States into an absolute, or at best a mixed monarchy.” †

APPENDIX 34C¹⁺

(II Page 335)

THE danger of secession, without adequate cause, is historically demonstrable to be slight.

* Address of the Assembly to the People of Virginia, 1799.

† Report on Virginia Resolutions.

"SIR, permit me to say that, of all the causes which justify the action of the southern States, I know none of greater gravity and more alarming magnitude than that now developed of the denial of the right of secession. A pretension so monstrous as that which perverts a restricted agency, constituted by sovereign States for common purposes, into the unlimited despotism of the majority, and denies all legitimate escape from such despotism, when powers not delegated are usurped, converts the whole constitutional fabric into the secure abode of lawless tyranny. . . . It is said that the right of secession, if conceded, makes of our Government a mere rope of sand; that to assert its existence imputes to the framers of the Constitution the folly of planting the seeds of death in that which was designed for perpetual existence. If this imputation were true, Sir, it would merely prove that their offspring was not exempt from that mortality which is the common lot of all that is not created by higher than human power. But it is not so, Sir. For two-thirds of a century this right has been known by many of the States to be, at all times, within their power. Yet, up to the present period, . . . there have been but two instances in which it has ever been threatened seriously; the first, when Massachusetts led the New England States in an attempt to escape from the dangers of our last war with Great Britain; the second when the same States proposed to secede on account of the admission of Texas . . . into the Union." *

APPENDIX 34^{CIΔ}

(II Page 336)

MR. JOHN ADAMS stated in his first Inaugural :

"The zeal and ardor of the people during the revolutionary war, supplying the place of government, commanded a degree of order, sufficient at least for the temporary preservation of

* Judah P. Benjamin, Speech in Senate, February 4, 1861.

society. The confederation, which was early felt to be necessary, was prepared from the models of the Batavia and Helvetic confederacies, the only examples which remain, with any detail and precision, in history, and certainly the only ones which the people at large had ever considered. But, reflecting on the striking difference in so many particulars between this country and those where a courier may go from the seat of government to the frontier in a single day, it was then certainly foreseen by some, who assisted in Congress at the formation of it, that it could not be durable."

APPENDIX 35

(I Page 97)

If this was intended as a general proposition that there is no political difference between a State (*i. e.*, Nation, or Country) and a county in that State, and that the only source of political power is relative numbers, it is sufficient to say that international law (to say nothing of the United States Constitution) is built upon the recognition of this difference, of kind (not degree) between an independent State, and the component parts of a State.^{35A} As a proposition applicable specifically to the United States, it is to be judged by facts hereinbefore cited; and further comment upon it from this point of view, must be either futile or unnecessary. It will here only be noted:

1st. That Mr. Madison says, "Without identifying the case of the United States with that of individual States, there is at least an instructive analogy between them," etc. (v. Appendix 31). Mr. Lincoln has no such scruples of statement.

2d. That the same question had been insistently asked in the Federal Convention, and was there definitely settled for this country (in so far as compact can settle anything). The contest between the large and small States,—a contest so bitter that Mr. Madison considered it the most threatening diffi-

culty the Convention had to settle, the Gordian knot which had to be loosed, and upon which many of the compromises of the Constitution hinged,—would have been utterly meaningless upon the supposition that, by the Constitution, power lay with a majority of the people of the United States. Earlier, Mr. James Wilson, whose efforts from the beginning were, as has been seen, to treat the Union of the States as a consolidation into one people, raised the question in the debates on the Confederation:

“It has been said that Congress is a representation of States not of individuals . . . It is strange that annexing the name of ‘State’ to ten thousand men, should give them an equal right with forty thousand. . . . It is asked, Shall nine colonies put it into the power of four to govern them as they please? I invert the question, and ask, shall two millions of people put it in the power of one million to govern them as they please? It is pretended . . . that the smaller colonies will be in danger from the greater. Speak in honest language and say, the minority will be in danger from the majority. And is there an assembly on earth, where this danger may not be equally pretended?” *

Certain of the acts of the Confederation were based upon a rough consideration of majority action; ^{35A1} but despite Mr. Wilson, the States refused to merge their sovereignty in one body. The men who framed the Confederation, as those who framed the Constitution, were not philosophers in search of abstract “rightful principles.” They were practical politicians (the phrase is not used in a disparaging sense), plenipotentiaries settling the best terms they could get for their respective countries in the compact into which they were entering. And the rights secured by that compact were not “natural” rights (whatever those may be), but resulted from definite agreements. Nor can any sense whatever be made of the Constitution, or the Debates thereupon, upon any supposition of majority power in one people of the United States.

* James Wilson, 1776. Jefferson’s “Autobiography,” “Works,” Vol. I, p. 35.

Its provisions * and its history utterly forbid an opinion that it looked upon the people of the United States as, in any political sense, the people of one State or Nation, to be ruled by the majority thereof. To the contrary, unless it be supposed that the makers of that instrument were blind to the necessary results of their action, it can only be supposed that it was framed with the definite object of forbidding the results which would ensue on such a conception.

As Chancellor Harper says:

"Many persons are startled when it is proposed to them that a single State, a small portion of the people and territory of the Union, has power to arrest the operations of the Government of the whole confederacy. They regard it as something unprecedented in Governments, and, as I before remarked, as absurd as the notion that any individual member of a consolidated Government should arrogate to himself the right to judge in the last resort, whether he was bound by the laws of his Government. The surprise is perhaps natural; but such persons do not call to mind that our Federative Government is itself an anomaly, and unprecedented among the Governments which have existed.† For certain specific purposes it has been invested with the character of a consolidated Government; it may, by means of its tribunals, operate directly on the persons, property and rights of individuals—for all other purposes it was intended by the Constitution to remain federative. Our notions are generally drawn from the examples of consolidated Governments, which are those which have commonly existed in the world." ‡

APPENDIX 35A

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"THE state is a society, or union of men—a sovereign society and a society of human beings, with an indelible charac-

* *Vide* Chap. 4, Appendix 23, etc.

† *Vide* Madison, *ante*.

‡ "The Remedy by State Interposition."

ter of individuality. The state is moreover an institution which acts through government, a contrivance which holds the power of the whole, opposite to the individual. Since the state then implies a society which acknowledges no superior, the idea of self-determination applied to it means that, as a unit and opposite to other states, it be independent, not dictated to by foreign governments, nor dependent upon them any more than itself has freely assented to be, by treaty and upon the principles of common justice and morality, and that it be allowed to rule itself, or that it have what the Greeks chiefly meant by the word autonomy." *

APPENDIX 35^{A1}

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E. G., "To amend the clause for calling upon the states for their quotas of troops . . .

"It was then moved after the words 'unless nine states shall assent to the same,' to insert 'provided that the nine states so assenting shall comprehend a majority of the people of the United States, excluding Negroes and Indians.'" †

APPENDIX 36

(I Page 97)

THIS, if neither as frank nor as violent a denunciation of the Constitution (by one elected and sworn to support it) as the Garrisonian invectives, is not less radical. It might indeed fairly be said to be, as put, not only this, but a defiance of the laws of nature.^{38A}

* Francis Lieber, "On Civil Liberty and Self-Government," Vol. I, p. 51, 1853.

† Journals of Congress, October 30, 1777.

Like so many of Mr. Lincoln's assertions, it was, at other times and places, modified :

"Now, gentlemen, I don't want to read at any great length, but this is the true complexion of all I have ever said in regard to the institution of slavery and the black race. This is the whole of it, and anything that argues me into his (Douglas's) idea of perfect social and political equality with the negro is but a specious and fantastic arrangement of words, by which a man can prove a horse-chestnut to be a chestnut horse. I will say here, while upon this subject, that I have no purpose, either directly or indirectly, to interfere with the institution of slavery in the States where it exists.^{36B} I believe I have no lawful right to do so, and I have no inclination to do so. I have no purpose to introduce political and social equality between the white and the black races. There is a physical difference between the two, which in my judgment, will probably forever forbid their living together upon the footing of perfect equality; and inasmuch as it becomes a necessity that there must be a difference, I, as well as Judge Douglas, am in favor of the race to which I belong having the superior position. I have never said anything to the contrary, but I hold that, notwithstanding all this, there is no reason in the world why the negro is not entitled to all the natural rights enumerated in the Declaration of Independence—the right to life, liberty, and the pursuit of happiness. I hold that he is as much entitled to these as the white man. I agree with Judge Douglas he is not my equal in many respects—certainly not in color, perhaps not in moral or intellectual endowment. But in the right to eat the bread, without the leave of anybody else, which his own hand earns, he is my equal and the equal of Judge Douglas, and the equal of every living man." *

"I will say then that I am not, nor ever have been, in favor of bringing about in any way the social and political equality of the white and black races—that I am not, nor ever have been, in favor of making voters or jurors of negroes, nor

* Lincoln-Douglas Debates, Ottawa, Ill., August 21, 1858; Nicolay & Hay, Vol. I, p. 289.

of qualifying them to hold office, nor to intermarry with white people; and I will say in addition to this that there is a physical difference between the white and black races which I believe will forever forbid the two races living together on terms of social and political equality. And inasmuch as they cannot so live, while they do remain together there must be the position of superior and inferior, and I as much as any other man am in favor of having the superior position assigned to the white race." *

"We were often—more than once at least—in the course of Judge Douglas's speech last night reminded that this government was made for white men—that he believed it was made for white men. Well, that is putting it into a shape in which no one wants to deny it . . ." †

One must wonder what Mr. Lincoln really meant by saying that it was not merely "as citizens" that "all men are equal," and yet that he held that "the negro is not my equal in many respects." That men should be "equal before the law" one may understand, and, in its right meaning, approve. That "all men are created equal" is nonsense, and worse. One may also wonder in what manner Mr. Lincoln proposed to solve the problem of two races living peaceably and profitably together in one democratic country, neither as political nor social equals, nor as master and servant, and who should not intermarry.³⁶⁰

However this may be, this qualified statement did not represent the ideas of even the more moderate portion of those adherents, whose behests he must have followed and did follow.

"Beyond all this, and coming still under the head of individual theories was the doctrine enunciated by Thomas Jefferson in the Declaration of Independence—the doctrine that all men were created equal—meaning of course before the law—But the theorist and humanitarian of the North, accepting the fundamental principle laid down in the Declaration, gave to it

* Nicolay & Hay, Vol. I, p. 369.

† Speech at Chicago, July 10, 1858; *ibid.*, Vol. I, p. 257. And see Speech on Colonization to Black People in New York, 1862.

a far wider application than had been intended by its authors—a breadth of application it would not bear. Such science as he had being of Scriptural origin, he interpreted the word 'equal' as signifying equal in the possibilities of their attributes—physical, moral, intellectual, and in so doing, he of course ignored the first principles of ethnology. It was, I now recognize, a somewhat wild-eyed school of philosophy, that of which I myself was a youthful disciple . . . In this all important respect I do not hesitate to say we theorists and abolitionists of the North, throughout that long anti-slavery discussion which ended with the 1861 clash of arms, were thoroughly wrong. In utter disregard of fundamental, scientific facts, we theoretically believed that all men—no matter what might be the color of their skin, or the texture of their hair—were, if placed under exactly similar conditions, in essentials the same. In other words we indulged in the curious and, as is now admitted, utterly erroneous theory that the African was, so to speak, an Anglo-Saxon, or, if you will, a Yankee 'who had never had a chance,'—a fellow-man who was guilty, as we chose to express it, of a skin not colored like our own. In other words, though carved in ebony, he also was in the image of God.

"Following out this theory, under the lead of men to whom scientific analysis and observation were anathema if opposed to accepted cardinal political theories as enunciated in the Declaration as read by them, the African was not only emancipated, but so far as the letter of the law, as expressed in an amended Constitution, would establish the fact, the quondam slave was in all respects placed on an equality, political, legal and moral, with those of the more advanced race.

"I do not hesitate here,—as one who largely entertained the theoretical views I have expressed,—I do not hesitate here to say, as the result of sixty years of more careful study and scientific observation, the theories then entertained by us were not only fundamentally wrong, but they further involved a problem in the presence of which I confess to-day I stand appalled." *

* Charles Francis Adams, "'Tis Sixty Years Since;" N. Y., 1913.

But the ideas of the more violent and dynamically more potent wing of Mr. Lincoln's supporters did not stop at equality; they said the negro was superior to the white. Mr. Garrison in 1867 told Lord Houghton that the blacks would in a few years after their emancipation, be the leading race in the Southern States in wealth, intelligence, and power. Mrs. Harriet Beecher Stowe, in "Uncle Tom's Cabin," a work the influence of which it would be hard to overrate,* represented the blacks as little below the angels; etc.

If it be granted that Mr. Lincoln's own meaning was more limited than this, and went no further than as defined by him in his debate with Mr. Douglas, then his more general statement was an unfortunate and misleading one.

APPENDIX 36A

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"HENCE the dogma that all men are equal is the most flagrant falsehood and the most immoral doctrine which men have ever believed; it means that the man who has not done his duty is as good as the one who has done his duty, and it takes away all sense from the teachings of the moralists, when they instruct youth that men who pursue one line of action will go down to loss and shame, and those who pursue another course will go up to honor and success." †

"Le principe de la démocratie se corrompt, non seulement lorsqu'on perd l'esprit d'égalité, mais encore quand on prend l'esprit d'égalité extrême . . . La démocratie a donc deux excès à éviter : l'esprit d'inégalité, qui la mène à l'aristocratie ou au gouvernement d'un seul; et l'esprit d'égalité extrême, qui la conduit au despotisme d'un seul, comme le despotisme d'un seul finit par la conquête. . . .

* *Vide* C. F. Adams's "Lee's Centenary."

† Sumner, "Sociological Fallacies," in "Earth Hunger."

"Autant que le ciel est éloigné de la terre, autant le véritable esprit d'égalité l'est-il de l'esprit d'égalité extrême. . . .

"La place naturelle de la vertu est auprès de la liberté; mais elle ne se trouve pas plus auprès de la liberté extrême qu'après de la servitude." *

Lord Acton, speaking of the French Revolution, states that

"The finest opportunity ever given to the world was thrown away, because the passion for equality made vain the hope of freedom." †

It is surely a fine and essentially true saying of Plato that "we must remember that there are two sorts of equality. One of them is the bare external rule of number and measure; and there is also a higher equality, which is the judgment of Zeus . . . This is that equality which gives more to the better and less to the inferior, and is the true political justice." ‡

The logical results of the doctrine of equality, politically applied, is thus shown by Mr. Lieber in the case of Athens:

"*Eleutheria*, indeed, frequently signifies with the Greek political writers, equality; that is, absolute equality, and *isotes*, equality as well as *eleutheria*, are terms actually used for democracy, by which was understood what we term democratic absolutism, or unlimited, despotic power in the demos; which, practically, can only mean the majority, without any guarantee of any rights. It was, therefore, perfectly consistent that the Greeks aimed at perfect liberty in perfect equality, as Aristotle states, not even allowing a difference on account of talent and virtue; so that they give the palos the lot, as the true characteristic of democracy. They were consistently led to the lot; in seeking for liberty, that is the highest enjoyment and manifestation of reason and will, or self-determination—they were led to its very negation and annihilation—to the lot,

* Montesquieu, *De L'Esprit des Lois*. Book 8, Chap. 2, 3.

† "Freedom in Christianity," p. 57.

‡ "Laws."

that is to chance. Not only were magistrates, but even generals and orators determined by lot."* -

"Athens, when she had sunk so low, that the lot decided the appointment to all important offices, would, at that very period, have been freest, while, in fact, her government had become plain democratic absolutism, one of the very worst of all governments, if, indeed, the term government can be properly used of that state of things which exhibits Athens after the times of Alexander, not like a bleeding and fallen hero, but rather like a dead body, on which birds and vermin make merry." †

A contemporary writer, whose impartiality is so great as to be almost a defect, is upon this subject entirely positive.

"Slavery has passed away in America . . . but the negro race . . . remains. The character of the constituencies has been profoundly lowered by the negro voters. . . ." ‡

"The enfranchisement of the negroes added a new and enormous mass of voters, who were utterly and childishly incompetent." §

"That the interests of all classes should be represented in the Legislature; that numbers as well as intelligence should have some voice in politics, is very true; but unless the government of mankind be essentially different from every other form of human enterprise, it must inevitably deteriorate if it is placed under the direct control of the most unintelligent classes . . . surely nothing in ancient alchemy was more irrational than the notion that increased ignorance in the elective body will be converted into increased capacity for good government in the representative body . . . The day will come when it will appear one of the strangest facts in the history of human folly that such a theory was regarded as liberal and progressive." ||

* Francis Lieber, "On Civil Liberty and Self-Government," pp. 62, 63; 1853.

† *Ibid.*, p. 40.

‡ Lecky, "Democracy and Liberty," Vol. I, p. 126; N. Y., 1896.

§ *Ibid.*, Vol. I, p. 93.

|| *Ibid.*, Vol. I, p. 26.

"As we have . . . abundantly seen, a tendency to democracy does not mean . . . a tendency towards greater liberty . . . equality is the idol of democracy, but, with the infinitely various capacities . . . of men, this can only be attained by a constant, systematic, stringent repression of their natural development. Whenever natural forces have unrestricted play, inequality is certain to ensue . . ." *

" . . . the American Constitution is, probably, the best example which history affords of wise political machinery. Nor are the great men who formed it to be blamed if their successors, by too lax laws of naturalization and by breaking down all the old restrictions and qualifications of race, colour, and property, have degraded the electorate, and in some respects impaired the working of the Constitution." †

APPENDIX 36B

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APPARENTLY Mr. Lincoln's friends scarcely took this literally; *e. g.*:

"Among the first congratulations which poured in upon Mr. Lincoln after his election was [one] from ex-Governor Chase . . . 'You are President-elect. I congratulate you and thank God. The great object of my wishes and labors for nineteen years is accomplished in the overthrow of the slave power,' " etc. ‡

When Mr. Chase's abolition sentiments are remembered, there is no cause for doubt as to what he meant by "the overthrow of the slave power." There is as little cause for surprise at his mistaking Mr. Lincoln's sentiments, in view of certain other statements made by the latter, *e. g.*:

* Lecky, "Democracy and Liberty," Vol. I, p. 256.

† *Ibid.*, Vol. I, p. 446.

‡ Nicolay & Hay, Vol. III, p. 245.

"So far as a peaceful, voluntary emancipation is concerned, the condition of the negro slave in America, scarcely less terrible to the contemplation of a free mind, is now as fixed and hopeless of change for the better as that of the lost souls . . . Our political problem now is, 'Can we as a nation continue together *permanently—forever*—half slave, and half free?' etc.*

So, also, a most important member of Mr. Lincoln's cabinet had said:

"Slavery must be abolished . . . freedom and slavery are two antagonistic elements of society in America . . . the party of freedom seeks complete and universal emancipation," etc. †

APPENDIX 36C

(II Page 344)

MR. JEFFERSON, as ardent an opponent of slavery as Mr. Lincoln, and from practical experience of the negro, and scientific knowledge, far better equipped to understand the problem, found himself unable to solve it by any other means than colonization in a foreign country. ‡

The following note is inserted, not as bearing in any way on the argument, but as a little matter of historical curiosity, being probably known to few.

"Run away on the 13th of September last from Abraham Lincoln of Springfield in the County of Chester, a Negro Man named Jack, about 30 Years of Age, low Stature, . . . Whoever secures the said Negro, and brings him to his Master, or to Mordecai Lincoln living among the Upper Inhabitants on Schuylkill, or to William Branson, in Philadelphia, shall have Twenty Shillings Reward and reasonable Charges." ‡

* Letter, August 15, 1855.

† Seward, Speech for Taylor, at Cleveland, October 26, 1848.

‡ v. Appendix^{20A}.

|| "Pennsylvania Gazette," No. 98, October 1, 1730.

APPENDIX 37

(I Page 97)

THIS is not to be disputed; and the power reserved to them (as emphatically reiterated by the Tenth Amendment to the Constitution) was all power "not delegated to the United States by the Constitution, nor prohibited by it to the States."

The wording of this shows as indisputably as thought can be expressed in language, that the powers were not granted by the United States to the several States, but were, to the contrary, delegated to the United States by the several States. That, therefore, the Union did not give their rights to the States, but, to the direct contrary, the States were the fountain and grantor of all rights of which the Union is possessed as a government.

APPENDIX 38

(I Page 97)

THE Constitution of Georgia was adopted February, 1777.

The Constitution of Connecticut,—“An act containing an Abstract and Declaration of the Rights and Privileges of the People of this State, and securing the same,”—was passed 1776. The preamble states “The People of this State, being . . . free and independent, have the sole and exclusive Right of governing themselves as a free, sovereign and independent State,” etc.

The Constitution of Delaware was proclaimed September, 1776.

The Declaration of Rights of Virginia was framed May 6, adopted June 12, 1776. In it is asserted that “no government separate from, or independent of the government of Virginia, ought to be erected or established within the limits thereof.” The Constitution of Virginia, framed by the Convention

which issued the Declaration of Rights, was adopted June, 1776, also preceding the Declaration of Independence.

The Constitution of Maryland was adopted August, 1776. It asserts in its Declaration of Rights, "That the people of this State ought to have the sole and exclusive right of regulating the internal government and police thereof."

The Constitution of New Hampshire was framed January, 1776.

The Constitution of New Jersey was published July 3, 1776.

The Constitution of New York was adopted April, 1777; after citing the Declaration of Independence, it says:

"Whereas this Convention, having taken this declaration into their most serious consideration . . . approve the same, and will . . . join with the other colonies in supporting it. By virtue of which several acts . . . and of the . . . conventions of this State, all power whatever therein *hath reverted to the people thereof* . . . This convention therefore *in the name and by the authority of the good people of this State*, doth ordain . . . that no authority shall, on any pretence whatever, be exercised over the people . . . of this State but such as shall be derived from and granted by them." *

The Constitution of North Carolina was adopted December, 1776. In the Declaration of Rights prefixed, it says:

"That the people of this State ought to have the sole and exclusive right of regulating the internal government and police thereof."

The Constitution of Pennsylvania was framed September, 1776. In its Declaration of Rights prefixed, it says:

"That the people of this State have the sole, exclusive, and inherent right of governing and regulating the internal police of the same."

The Constitution of South Carolina was adopted March, 1776 (prior to the Declaration of Independence).

Several of the States thus had framed Constitutions for

* Italics are author's.

themselves before the Declaration. Some of these had provided in their Constitutions that those instruments should be valid only until a reconciliation with Great Britain. Had such Colonies looked upon themselves as having become but parts of a whole, such a provision would not have been made; for such a political condition would have precluded their reintegration as a part of the British Empire. Others, instituting constitutions for themselves after that instrument, declared that the sole right of governing themselves was vested in themselves, which equally precludes the idea of anything but the Declaration of an independent State. *E. g.*, New York expressly alleged that Declaration as one of the instruments by which all power reverted to herself,—not to a union.

But the bearing of Mr. Lincoln's statement on the question, were it correct, is not perceived.

"We cannot comprehend that train of reasoning which would maintain that the extent of power granted by the people is to be ascertained not by the nature and terms of the grant, but by its date. Some state constitutions were formed before, some since that of the United States. We cannot believe that their relation to each other is in any degree dependent upon this circumstance." *

APPENDIX 39

(*I Page 97*)

"MASSACHUSETTS is a sovereign and independent State," etc. †

APPENDIX 40

(*I Page 97*)

"IN his inaugural address in 1861, Lincoln said: 'The Union is much older than the Constitution.' In a sense this

* Justice Marshall, Opinion in *M'Culloch vs. Maryland et al.*

† Letter of Abraham Lincoln, May 17, 1859, to T. Canisius.

is true, as I have already explained. But if by union or nation is meant an organized single political community subject to a single sovereign government, I see no historical foundation for the statement." *

The commentators who have undertaken an irenicon of Mr. Lincoln's opinions and the facts of history, remind one, "*in a sense*," of the prospectus proposed by Mr. Shortface in the *Spectator*:

"We whose names are hereunto subscribed, do solemnly declare, that we do in our Consciences believe two and two make four; and that we shall adjudge any man whatsoever to be our enemy who endeavours to persuade us to the contrary. We are likewise ready to maintain, with the hazard of all that is near and dear to us, that six is less than seven in all times and all places; and that ten will not be more three years hence than it is at present. We do also firmly declare, that it is our resolution as long as we live to call black black, and white white. And we shall upon all occasions oppose such persons that upon any day of the year shall call black white, or white black, with the utmost peril of our lives and fortunes."

If Mr. Chamberlain's "in a sense" reminds one of the defence of Baron Grimm's looks by an admirer,—“He has a crooked nose.” “Yes, but it is crooked on the right side.”—Mr. Lincoln's own arguments, by the way, are sometimes of this kind; *e. g.*: “It is said that the admission of West Virginia is secession, and tolerated only because it is our secession. Well, if we call it by that name, there is still difference enough between secession against the Constitution and secession in favour of the Constitution.” †—if Judge Chamberlain may represent Baron Grimm's lady friend, Professor McLaughlin may stand for the victim of Mr. Wilkes's *beaux yeux*: “Squint indeed! He squints no more than every gentleman ought to.”

* D. H. Chamberlain, “Historical Conception of the Constitution,” 1902.

† Opinion on the admission of West Virginia, December 31, 1862.

"Of course men who argued from the basis of the organic idea and nevertheless maintained that the United States was more than a multiple of units organically separate, did not in so many words declare that they had taken up new philosophic ground; but in fact they had left compact-thinking behind them and from the new view point met the declaration of state sovereignty with a new interpretation of history which naturally and logically sprang from the new method of thought. The ordinary mode adopted was to deny that the states were ever sovereign and to insist, as Lincoln did, that the Union was older than the States." *

One might be tempted to ask, "In the name of veracity! why 'of course'†" But one seems to perceive what Professor McLaughlin may think he means, upon a reference to his article, "James Wilson and the Constitution," † wherein he states that

"in declaring that each state retained its sovereignty, the Articles [of Confederation] spoke the language of arrant falsehood . . . for the nation existed, and the need of its time was its recognition by the organization of a national state." 40A

The Articles of Confederation (and, "of course," of consequence, the Constitution, Journals of Congress, and all other contemporary official acts and documents) being an "arrant" falsehood (Professorial euphemism! Sounds more awfuller even than "dam lie") "organic thinkers" were, "of course," telling the "arrant" truth,—meaning "of course" some extraordinarily true kind of truth—"in denying that the States ever possessed Sovereignty," etc., etc.

In view of this "natural and logical" solution of the problem, it must seem a pity that it did not occur to gentlemen "who argued from the basis of the organic idea," to state the basis of their argument in words that might have been understood of "the plain people," of whom they were so fond. The breath and ink (not to mention blood and tears) which

* Social Compact and Constitutional Construction."

† "Political Science Quarterly," March, 1897.

might have been avoided, if only Professor McLaughlin had been around to expound!

It does not seem necessary to summarize Prof. McLaughlin's ingenious study. *Ex pede Herculem*—"In the light of the material which I have cited, one might perhaps be fully justified in affirming that the framers of the Constitution considered it a compact analogous to the social compact (between the people as individuals), and similar in its origin to the state constitutions in all essential particulars." ^{40B}

Indeed, Mr. McLaughlin's summary method of dealing with treaties, official documents and such trifles, makes comment thereon futile.^{40C} It is but fair to state that it is presented rather as having a certain interest from his official position as instructor of history to future American citizens, than because it is exceptionally immoral or ridiculous.

In fact, it is not even new, *e. g.*, a somewhat amusing instance of the same style of dealing with an awkward fact is furnished by a biographer of Montesquieu. That celebrated person was credited with the successful trick of reading an expurgated copy of his "Lettres Persanes," to Cardinal Fleury, who, as minister of Louis XIV, opposed his admission to the Academy on the ground of that work. His biographer, admitting the trick, denies that it was an improper one: in point of fact, the letters having been disavowed, it was as if they had never been written. He bases the dictum upon very excellent reasons:

"Si donc d'Alembert imprimait cela, . . . c'est que, dans l'intérêt de la mémoire de cet homme illustre, dans celui de sa famille, dans celui de l'Académie qui l'avait reçu, dans l'intérêt même du parti philosophique, dont d'Alembert était un des organes, . . . on trouvait nécessaire de considérer celles des lettres persanes qui avaient été désavouées par Montesquieu, comme n'ayant pas même été écrites par lui."

It is not, however, intended to accuse Professor McLaughlin of having been influenced by a knowledge of Montesquieu.

"Two whole generations passed away between the adoption of the Federal Constitution in 1789 and the War of Se-

cession in 1861. When that war broke out, the last of the framers of the Constitution had been a score of years in his grave. Evidence, however, is conclusive that, until the decennium between 1830 and 1840, the belief was nearly universal that in case of a final, unavoidable issue, sovereignty resided in the State, and to the State its citizens' allegiance was due.

"The technical argument—the logic of the proposition—seems plain; in fact, unanswerable. The original sovereignty was indisputably in the State; in order to establish a nationality certain attributes of sovereignty were ceded by the several States to a common central organization—what Jefferson described as a Department of Foreign Affairs; all attributes not thus specifically conceded were reserved to the States; and no attributes of moment were to be included by construction. Yet no attribute is so important as allegiance, citizenship. So far all is elementary, indisputable. And now we come to the crux of the proposition. Not only was all allegiance—the right to define and establish citizenship—not among the attributes specifically conceded by the several States to the central nationality, but on the contrary, it was explicitly reserved. The instrument definitely declared that 'the citizens of each State' should be entitled to 'all Privileges and Immunities of Citizens in the several States.' This, and, as respects citizenship, nothing more. Ultimate allegiance was, therefore, due to the State which defined and conferred citizenship, not to the central organization which accepted as citizens whomsoever a State pronounced to be such.

"Thus far the situation is historical; nor does there seem any escape from the logical deduction to be drawn from it. Citizenship, originating with the several States, of course involved allegiance to the State. But, speaking historically, and in a philosophical rather than a legal spirit, it is little more than a commonplace to assert that one great safeguard of the Anglo-Saxon race—what might almost be termed its political palladium—has ever been that hard, if at times illogical, common-sense, which, recognizing established custom as a binding rule of action, found its embodiment in what we are wont with pride to term the Common Law. Now, just as

there can, I think, be no question as to the source of our American citizenship, and consequently, as to ultimate sovereignty when in 1789 the Constitution was originally adopted, there can be equally little question that during the lives of the two succeeding generations a custom, so to speak, of nationality grew up which became the accepted Common Law of the land, and practically binding as such. This was true in the South as well as the North, though the custom was more hardened into accepted law in the latter than in the former; but the growth and acceptance as law of the custom of nationality even in the South were incontrovertibly shown in the very act of secession—the seceding States at once crystallizing into a Confederacy. Nationality in some form was assumed as a thing of course; and Nationality must involve Allegiance.

“ . . . but it naturally came to pass that in many of the States a generation grew up, dating from the second of our wars with Great Britain—that known as the War of 1812—a generation which, gravitating steadily, and more and more strongly, to nationality, took an altogether different view of allegiance. Those of this generation were, moreover, wholly within their right. The sovereignty was confessedly divided; and it was for those of the new generation to elect. The movements of both science and civilization were behind the Nationalists. The railroad obliterated State lines, while it unified the nation. What did the foreign immigrants, now swarming across the ocean, care for States? They knew only the nation which adopted and protected them. Brought up in Europe, the talk of State Sovereignty was to them foolishness. Its alphabet even was incomprehensible. In a word, it, too, was ‘caviare to the general.’ ” *

Mr. Adams said something about “that hard if illogical common sense which is one great safeguard of the *Anglo-Saxon* race,” as explanatory of the disregard of the Constitution; now it is the ignorance of the “foreign immigrant,” which is responsible. Prof. McLaughlin pins his belief to “natural and logical” reasons. But all roads lead to Rome.

* Charles Francis Adams, “Trans-Atlantic Historical Solidarity,” Oxford, pp. 45-48; 1913.

"Burke then proceeds in another burst of rhetoric to call attention to the fact that all this has been accomplished by 'a people who are still, as it were, but in the gristle, and not yet hardened into the bone of manhood. When I contemplate these things,' he adds, 'when I know that the colonies in general owe little or nothing to any care of ours, and that they are not squeezed into this happy form by the constraints of watchful and suspicious government, but that through a wise and salutary neglect, a generous nature has been suffered to take her own way to perfection; when I reflect upon these effects, when I see how profitable they have been to us, I feel all the pride of power sink, and all presumption in the wisdom of human contrivances melt and die away within me. My rigour relents. I pardon something to the spirit of liberty.'

"If the long and memorable record of English parliamentary utterance, unique in history and educational importance, contains a finer rhetorical outburst than the foregoing, I can only say I am not acquainted with it. This alone would justify quotation; the passage is, however, also very opportune in the present connexion. With that inimitable happiness of speech peculiar to himself, Burke referred to the 'small seminal principles' rather than 'formed bodies' dotted in 1704 along the fifteen hundred miles of North American Atlantic seaboard, which seventy years later, at the time Burke spoke, had by a process of natural growth become 'a people still, as it were, but in the gristle, and not yet hardened into the bone of manhood.' But the tropes and forms of speech in which he then clad his thought are to the American investigator of the present time curiously significant—they seem inspired. 'My pride of power sinks' . . . 'all presumption in the wisdom of human contrivance melts' . . . 'I pardon something to the spirit of liberty.' 'Power!' 'Human contrivances!' 'Spirit of liberty!' In these phrases was hidden the mystery of America's situation—the problem of America's future, then matter of infinite question. Indeed, the chances of fate inclined distinctly towards disaster; for the spirit of liberty prevailed at that juncture in excess; 'power' was deficient; the 'human contrivance' essential to a successful solution of the problem re-

mained to be devised. The situation, at best critical, was on any doctrine of chance fairly appalling. The question of man's capacity for self-government through representation based on general suffrage, was at issue. Would the provinces, freed from foreign guidance and motherly control, prove equal to the occasion?

"As what ensued—that process of hardening from the 'gristle' of colonialism to the 'bone' of nationality—is familiar history, it will not here bear repetition; so I shall now condense volumes into a single page. The issue was two-fold: would the thirteen independent colonial offshoots develop among them leaders of the matured public spirit and constructive ability adequate for the work in hand to be done, that work being a practical scheme of centralized government? and, this leadership and constructive ability assumed, would the popular mass behind the leadership prove sufficiently advanced in political education to accept the results thus reached, and acquiesce therein? It was the old problem—Greece and the Achaian League over again, with two thousand years of human evolution intervening. What, if anything, had mankind learned in the interim? The world, and with cause, was very incredulous as to the answer this query was about to receive. Would an ordered nationality, or would a condition of chronic anarchy, emerge? The odds stood heavy in favour of the latter.

"So far as leadership and constructive ability were concerned, the struggle for American independence had in its outcome been conclusive. They were there. Chatham, with the practised eye of a statesman—an eye both natural and trained—early recognized this fact, and bore witness of record to it. Such individualities as Washington and Franklin ^{40D} were conclusive as to leadership; while, as respects constructive ability, Massachusetts and Virginia took the lead. The latter evolved the Declaration of Independence; the former its written constitution of 1782, in the constructive aspect infinitely the more important production of the two. But, though the leadership was there, the question whether its teachings would not in practical working prove caviare to the general remained to be seen. Were the rank and file of those then

inhabiting the thirteen provinces to be depended on to follow the leaders, and accept their conclusions? if not, those leaders were after all but voices crying in the wilderness. The world in such case would then but witness a repetition of Achaian experiences.

"The ordeal was successfully met; but that final process of crystallization into a constitutional and confirmed nationality occupied close upon a century. Begun in 1776, it stood completed in 1865.

"It was, and still is, fairly open to question whether the method of solving the problem adopted by the fathers in 1787 could not most fitly as well as accurately be described as a clever political trick, rather than an inspiration. It certainly would have been a trick, so far as the mass of those interested in the outcome were concerned, had the leaders in the constructive work then done themselves suspected what shape that outcome was to take. They most assuredly did not. Building better than they knew, they deceived themselves. They actually had faith in the metaphysical abstractions to which they had recourse! Time, outside pressure, and the rapid development of the resources of nature, then wholly undreamed of, did the rest. The study of what, step by step, occurred in the process is most interesting and, as respects the future, suggestive.

"The obstacle in the way of crystallization lay in an excess of that 'spirit of liberty' to which Burke pronounced himself so tolerant; and in an absence of that 'power' to coerce in presence of which his pride insensibly sank. The spirit of liberty in America, as before in Greece, asserted itself in a pronounced clinging to independence—local independence. An independence which bore a resemblance unpleasantly suggestive of licence. Each one of the thirteen original provinces asserted its sovereignty" [Mr. Adams differs from Mr. Lincoln's "natural and logical" denial of this fact]—"loudly proclaimed itself a nation. The provincialism was intense; the mutual jealousies, dislikes, and aversions only short of racial, were quite as pronounced as those which formerly led to the downfall of the Achaian League, or as more recently existed

in the four British nationalities; for Saxon never disliked or despised Gael or Celt more than did Carolinians the Yankee. As well attempt to crystallize oil and water! Under such conditions the problem which taxed the constructive ingenuity of the leaders, after the conflict with Great Britain was over and outside pressure withdrawn, was to devise a deception—a nationality which should not be a sovereignty; and they actually accomplished that feat, persuading others by first thoroughly deceiving themselves.

“To bring the result about they had recourse to what I have already referred to as a metaphysical abstraction—they invented what in perfect good faith they proclaimed as divided sovereignty; ^{40E} but which in reality was a most ingenious and deceptive temporary *modus vivendi*. The proposition, in the nature of a compromise, recommended itself to the general popular mind; that compromises of this sort are apt so to recommend themselves is matter of common observation. The situation as then (1789) existing in the general public understanding, North and South, has been not unfairly stated in the recent publication of a Confederate, still, half a century after Appomattox, quite ‘unreconstructed,’ as we phrase it; that is, a belated survivor of the ‘Lost Cause,’ one now in America occupying politically much the position occupied here by a confirmed Jacobite two centuries ago, or in France at present by a dyed-in-the-wool Bourbonist. Referring to our War of Independence, the writer from whom I quote says: ‘At no time during the rebellion [that is, the War of Independence] did the American nations act as a single nation. A treaty was entered into by them on November 15, 1777, the treaty being known as Articles of Confederation. . . . This was the first governmental union made by the American nations for purposes other than war, and the object of this union was to wage war successfully. The nations parties to the compact each continued to exercise full powers of sovereignty; and, when they disapproved any provision of the Confederation, such provision was disregarded by them.’

“Fired with that local spirit of liberty to which Burke was so forgiving, this somewhat anarchistic state of affairs seems

yet to commend itself as ideal to the judgment of this writer. In other words, the thirteen 'nations,' which would now have increased in number to forty-eight, then dwelt together in amity, or otherwise, as the case might be, under a compact; obeying the decrees of a central council when it was agreeable for them so to do, and paying no attention to them if not agreeable. Yet this writer, representing very fairly the liberty extremists, goes on to say that when the Federal Constitution was framed, 'Few of the American nations, if any, were willing to become parties to the written agreement until they had been assured that it should not be construed to affect their sovereignty in the least. They were willing to delegate specified powers to a holding company—such as the federal agents would make—for each nation would have the right to take back the powers so delegated.'

"As I have said, this is the extreme States-right view of results brought about through the famous Federal Constitution of 1789. Historically, however, it can equally well be maintained that the Constitution was framed on the principle of a nationality—that is, Congress and the National Executive, as well as the State Legislature and the State Executive, acted directly on the citizen. Each having jurisdiction, the enactments and authority of each, within certain limits, applied to the individual, and he was thus subjected to a double or divided, and hence possibly conflicting, allegiance. The question, in fact, was whether the national powers thus delegated were irrevocable, or could at any time be recalled by the constituent State.

"Such a system, which historically and beyond question was that which did exist in the early days of the Republic, constituted, though we were not conscious of the fact, a phase in a process of evolution—a transitory phase which might result in almost anything—segregation, consolidated nationality, not impossibly chronic anarchy. Meanwhile as a transitory phase—a condition of, so to speak, unstable equilibrium—it was marked by continual dispute and ill-feeling. This was true at nearly all times, and in separate sections of the country at different times. For example, within ten years of the adoption

of the Federal Constitution, the National Government, confronted by a supposed political emergency, undertook to assert its sovereignty through the passage of statutes known as the Alien and Sedition Laws. Though the wisdom of the legislation was questionable, that its enactment was within the province of any nationality possessing sovereignty would at once to-day be admitted. It was, however, immediately and peremptorily challenged by the party of States-rights, Thomas Jefferson himself drawing up votes of nullification passed by the Legislatures of three States. Those enactments are now known in history as the 'Kentucky Resolutions of 1798.' Thus early was foreshadowed the secession ordinances of sixty years later. Again, early in the following century the adherents of Jefferson, now President, being in political control, the four States then constituting the New England portion of the United States, disliking an embargo at that time imposed by the National Government in restraint of foreign commerce, gravely considered a withdrawal from the Union, though no overt act to that end was actually committed. As then presented, the issue was based exclusively on commercial considerations. A few years later, in 1820, the slavery question came to the front, there to remain until actual battle was joined; and, in the angry discussion which arose in connexion with new States about to be organized, threats of disunion through secession were freely made. The tariff was next the source of sectional strife, a system of agriculture based on slavery being the underlying cause of trouble. In this case one of the States—South Carolina—undertook to 'nullify,' as it was termed, an enactment of Congress, declaring it inoperative within South Carolina's boundaries. The National Government was set at open defiance. This time the issue was compromised and temporarily adjourned, only presently to assert itself anew, slavery being again the underlying cause, primarily in connexion with the annexation to the United States of Texas, an independent republic. And now, once more, the State of Massachusetts, again committing no overt act, pronounced the violation of the Constitution so gross that a secession from the Union, though not actually attempted, might be

considered justifiable. From this time on, and for fifteen years, slavery was continually at issue, with the menace of disunion for ever impending. A withdrawal was widely and loudly advocated at the South by the believers in an industrial system based on African slave labour; while in the North a peaceable dissolution was urged on the ground that, because of its recognition of slavery, the Federal Constitution was a compact with hell." *

In another place Mr. Adams summarizes this same view :

"The constitutional issue—that of State Sovereignty, as opposed to the ideal, Nationality. And, whether for better or worse, this issue, I very confidently submit, has been settled. We now, also, looking at it in more observant mood, in a spirit at once philosophical and historical, see that it involves a process of natural evolution which, under the conditions prevailing, could hardly result in any other settlement than that which came about . . . secession is a lost cause; and, whether for good or ill, the United States exists, and will continue to exist a unified world Power. . . ." †

There is a vast difference between this statement, which portrays an undoubted change of sentiment as to the government of the country (the fulfilment of Patrick Henry's prediction: "If we admit this consolidated government, it will be because we like a great, splendid one. Some way or other we must be a great and mighty empire; we must have an army, and a navy, and a number of things. When the American spirit was in its youth, the language of America was different: liberty, sir, was then the primary object") and that of Prof. McLaughlin with which it is herein allied. Nevertheless, to use "plain language," the essential spirit of the one is that of the other. The attitude of Mr. Adams is clearly defined as follows: *viz.*:

* Charles Francis Adams, "Trans-Atlantic Historical Solidarity," pp. 34-42; Oxford, 1913.

† "'Tis Sixty Years Since," 1903.

"If ever a topic of contention was thoroughly thrashed out—so thrashed out, in fact, as to offer no possible gleaning of novelty—it might be inferred that among us in America this Divided Sovereignty conception had been subjected to that process. Yet years ago I ventured the opinion that such was not altogether the case; and to that opinion I still adhere. To my mind, the difficulty with the discussion has always been that throughout, extending as it has over the lives of three generations, it has in essence been too abstract, legal and technical—in a word, academic—and not sufficiently historical, sociological and psychological; in another word, human. It has been made to turn on the wording of certain written instruments. Yet those instruments were in themselves confessedly not explicit; and, when discussing them, far too little regard was paid to traditions, local ties, and inherited prejudices. As matter of fact, however, actual men as they live, move, and have their being, care little for acts of parliaments or theories, but they are the creatures of heredity." *

"Which 'ud be the biggest lie," asked Father Tom, "if I said I seen a turkey-cock lying on the broad ov his back and picking the stars out ov the sky, or if I was to say that I seen a ganther in the same intherestin' posture, raycreating himself wid similar asthronomical experiments?"

"In troth, then," says the Pope, "I dunna which 'ud be the biggest lie, to my mind," says he, "the one appears to be as big a bounce as the other."

Mr. Adams does not characterize the Articles of Confederation and other "certain written instruments," enactments of sovereign States, as "arrant falsehoods." He waives them, as of no importance. The unification of the States which, according to Professor McLaughlin took place prior to 1783, thereby invalidating all later agreements, took place. (substantially), according to Mr. Adams, considerably after 1788 (somewhere indeed about 1861), thereby invalidating prior

* "Trans-Atlantic Historical Solidarity," pp. 42, 43.

compacts. Compacts, *i. e.*, constitutions are equally inconsiderable upon either doctrine. But while the facts in the case are not denied by that of Mr. Adams, its ethic is the worse, since it strikes at the root stock of that faith which is the necessary prerequisite of social life. On his doctrine, it is unnecessary for John Smith to produce documents demonstrating that Bill Jones has not delivered goods paid for by him; the Judge does not doubt that this is true, but it is to be remembered that times are changed; that Bill Jones did not remember, when he sold the goods, that he might afterwards be unwilling to deliver them; that, in brief, when he said he would die a bachelor he did not think he would live to be married. After all, human beings are human beings, and not parchment instruments; boys will be boys, etc., etc. It would also be inconvenient for Bill to return the money received for the goods. Mrs. Jones needs a bracelet; the kids want a sled; mere agreements should not be allowed to destroy the happiness of a worthy family,—don't let us mention the Smith kids and Mrs. Smith. The said Jones is therefore dismissed without a stain on his character. The South was constitutionally,—the North naturally,—right. Why quarrel? Bless you, my children, and be friends! ^{40F}

How can the fact that certain of the parties to the compact “had left compact thinking behind them” (to use the chaste eloquence of Prof. McLaughlin) invalidate that compact in the court of ethics,—in which court only is the historian an advocate? Every man who breaks a business engagement, or runs away from his wife, can say as much: it was inconvenient to keep the engagement; he was tired of the lady. Mr. Adams's doctrine that such a change can retroactively change compacts deliberately and solemnly entered into, is worse than the old doctrine of *ex post facto* laws, abolished in this country at that era,—it strikes down the sanctity of every compact, whether between sovereignties, corporations, or individuals. Such a plea may *explain* a breach of faith,—may *justify* it in the eyes of those who “have left compact thinking behind.” The expression should be cherished as a real addition to diplomacy. “Breach of compact,” “breach of faith”: at such ugly expressions the muscles begin to grow tense; the knuckles en-

large. But "left compact thinking behind,"—and presto! one is transported to the halcyon region of metaphysics, psychology, political philosophy, etc., where all that is is right, where treaties are "scraps of paper," "neutrality but a word," etc.; and "the God of things as they are" nods contentedly.

All this is most tolerable and not to be borne; but when Mr. Adams extends this kind of ægis over his opponents—If, reversing Homer, Teucer interposes the protection of his buckler to Telamon, the latter may properly reject it, even with indignation: "Brother, not so! Ajax may not crouch for shelter."

In the two great crises of the United States,—the so-called Revolution (really rebellion) and the so-called Rebellion which (unless one can rebel against oneself), was nothing of the kind,—the opposition in each case had the happiness of a military leader so adequate to its noblest issues as to remain its chosen type and representative. In all history no two men (of the minutiae of whose lives we are so well informed) appear so fortunately and majestically on the stage as do Washington and his countryman, Lee.

The earlier Adams, it has been said, admired his leader, Mr. Washington, as the Scotchman joked, "wi' deeficulty"; but his descendant exudes admiration for his antagonist, Mr. Lee,—to *his* efforts is Mr. Lee largely indebted for his reputation.

"In a recent careful study of Lee, by one who has given to his subject much thought and thorough inquiry, I find it asserted that I individually have by my utterances 'surely done more than any one else to help Lee on to the national glory which is his due.' Whether this be so or not, to-day, and Oxford here is a sufficiently appropriate arena for the purpose, I propose to essay a more ambitious flight. The authority I have just quoted spoke of 'national glory.' I ambition a larger scheme, world fame."

Mr. Adams then proceeds:

"Coming then directly to the matter in hand, my own observation tells me that the charge still most commonly made against Lee in that section of my own country to which I be-

long and with which I sympathize is that, in plain language, he was false to his flag. Educated at the national military academy, subsequently an officer of the United States Army, he abjured his allegiance and bore arms against the Government he had sworn to uphold. In other words, he was a military traitor. I state the charge in the tersest language possible; and the facts are as stated. Having done so, and, for the purpose of the present occasion, admitting the facts, I add as the result of mature reflection, that under exactly similar conditions I would myself have done as Lee did . . . Robert E. Lee, false to his oath and flag, was a renegade! And, as a rule, renegades are not included among the truly great of the world," etc.*

Mr. Adams himself would have done as did Mr. Lee! What higher praise? Why further show that Mr. Lee as "the embodiment of pre-natal conditions, a Virginian of Virginians," etc., etc., was with entire propriety "false to his allegiance," "a renegade to his flag," "treasonable in this position," etc. Mr. Adams would have been the same!

As a fine bronze escapes unimpaired the well-meant lustrations of the housemaid's bucket, the character of Mr. Lee emerges from such abstersion; he needs as little as he would have condoned such defense and praise, which exempts him personally from what remains a crime in his compeers. His justification, or praise, can be no other than that of Mr. Davis, Mr. Benjamin, or any other "rebel," be he Mississippian of the Mississippians, South Carolinian of the South Carolinians, Louisianian of the Louisianians; and must lie in the justice of their and his cause,—and in the manner of their pursuit of it,—not in cheap, theatrical antithesis nor pseudo-sentiment. Nor are "the facts as stated." "My Father was no traitor."

"Traitor" is one who betrays a trust, using powers entrusted to him to the injury of those who trusted him. What trust did Mr. Lee betray? He resigned his position in the army of the United States, before he accepted one in that of the Confederate States. Concrete example is better than abstract definition.—There have been two well-known "traitors" in

* "Trans-Atlantic Historical Solidarity," Oxford, 1913.

these United States: Benedict Arnold and Aaron Burr (both New Englanders; for Burr's parentage was of New England). Does Mr. Adams mean to include in the same connotation with these Mr. Lee and other Southern soldiers? He must include Genl. Thomas, one of the ablest of the Northern generals, but a Virginian born, and "traitor" to his State.*

"Educated at the national military academy . . . he abjured his allegiance and bore arms against the Government he had sworn to uphold!" Mr. Adams was well aware when he wrote the passage, that at that "national military academy" a legal text-book used by the cadets, under the sanction of the government, taught the right of secession; ^{40G} and that a man's "country" was his State, as indeed it was commonly termed in the days of that political theory, which Mr. Adams granted.^{40H} Mr. Lee had not sworn to uphold "the Government"; he had sworn to "bear true faith and allegiance to the United States of America, and that I will serve them honestly and faithfully, against their enemies or opposers, whomsoever," etc.—a very different oath, not even formally violated by his action. A proof of this is that, after the war, the military oath of the United States was changed to cover future possibilities of similar nature. But, in any case, the prior resignation of the position upon which the oath was entailed cleared him of violating it. Mr. Lee did not "abjure his allegiance." He held it true to his state, as did his father before him. (v. Appendix ^{40H}, p. 380.) But had he done so, is it matter of reproach to a freeman to "abjure his allegiance"? Any emigrant or immigrant does so as a matter of course. Is it praiseworthy to be adscript to the soil? ^{40I}

* Mr. Govr. Morris was for giving to the Union an exclusive right to declare what shd. be treason. In case of a contest between the U. S. and a particular State, the people of the latter must under the disjunctive terms of the clause, be traitors to one or other authority.

"* * * Mr. Madison * * * added that, as the definition here was of treason against *the U. S.* it would seem that the individual States wd. be left in possession of a concurrent power so far as to define & punish treason particularly agst. themselves; which might involve double punishment." Journal of the Constitutional Convention of 1787, August 20th. Gaillard Hunt's Writings of Madison, 4: 246-247.

APPENDIX 40A

(II Page 355)

“ . . . can it be believed that Mr. Yates did not misunderstand J[ames] M[adison] in making him say, that the States had *then* ‘never possessed the essential rights of Sovereignty’ and that ‘*these* had always been vested in the Congress then existing?’ The charge is incredible, when it is recollected that the *second* of the Articles of Confederation emphatically declares ‘that each State *retains* its *sovereignty*, freedom & independence and every power,’ etc.” *

Evidently Mr. Madison might have profited by a few lessons on Constitutional subjects from the new school of history.

APPENDIX 40B

(II Page 356)

MR. MADISON has again the misfortune to differ with the Professor: he expressly and repeatedly asserted that the Constitution was not a “social compact,” but a State compact. It is useless to point out that the ratifications of the States positively contradict Professor McLaughlin’s statement, since these also may be “arrant falsehoods.”

Mr. Madison indeed was so unsuccessful in “leaving compact thinking behind,” that he looked upon it as the only foundation of liberty, thereby differing from Professor McLaughlin, and, according to him, from Mr. Lincoln.

“The Govt. of the U. S. like all Govts. free in their principles, rests on compact; a compact, not between the Govt. & the parties who formed & live under it; but among the parties themselves and the strongest of Govts. are those in which the compacts were most fairly formed and most faithfully executed.”

* Madison to W. C. Rives, October 21, 1833.

"It must not be forgotten that compact, express or implied is the vital principle of free Governments as contradistinguished from Governments not free; and that a revolt against this principle leaves no choice but between anarchy and despotism."

"Altho' the old idea of a compact between the Govt. & the people be justly exploded, the idea of a compact among those who are parties to a Govt. is a fundamental principle of free Govt.

"The original compact is the one implied or presumed, but nowhere reduced to writing, by which a people agree to form one society. The next is a compact, here for the first time reduced to writing, by which the people in their social state agree to a Govt. over them. These two compacts may be considered as blended in the Constitution of the U. S., which recognises a union or society of States, and makes it the basis of the Govt. formed by the people to it."

"The essential difference between a free Government and Government not free, is that the former is founded on compact, the parties to which are mutually and equally bound by it."

"The characteristic distinction between free Governments and Governments not free is that the former are founded on compact, not between the Government and those for whom it acts, but among the parties creating the Government."

"In settling the question between these rival claims of power, it is proper to keep in mind that all power in just & free Govts. is derived from compact."

"Of all free Govts. compact is the basis & the essence," etc., etc.

Where Mr. Madison's exegesis of the Constitution may seem open to criticism, there is yet this difference to be noted between it and that of the later school which has more or less held his doctrine, viz., he does not deny the historic facts at the base of the Constitution.

APPENDIX 40C

(II Page 356)

“Nos anciens, amateurs de la franche justice,
 Avoient de fascheux noms nommé l’horrible vice;
 Ils appeloient brigand ce qu’on dit entre nous
 Homme qui s’accomode, et ce nom est plus doux;
 Ils tenoient pour larron qui faict son mesnage,
 Pour poltron un finet, qui prend son avantage;
 Ils nommoïent trahison ce qui est bon tour;” etc.

“In the old times black was not counted white.”

Alas! as is seen, those times were already old when D’Aubigné and Shakespeare wrote.

APPENDIX 40D

(II Page 360)

WHAT were Mr. Franklin’s contributions to the political formation of the U. S. after the Revolution or, in fact, before? The lugging him in, for admiration, without reason, is one of the symptoms of a prevalent and fatal disease,—the “success at any price” attitude.

Montesquieu says, “Le plus grand mal que fait un ministre sans probité n’est pas de desservir son prince et de ruiner son peuple; il y en a un autre, à mon avis, mille fois plus dangereux: c’est le mauvais exemple qu’il donne.” And surely this evil is enhanced when, far from injuring, he has benefited his country.

Though his grossness (screened from publicity by its vileness), and his opportunism, are little known in their worst aspect, yet his autobiography has been widely read; and it cannot be considered a favorable indication that a nation, knowing it, has placed its writer among the first figures of its Pantheon. M. Sainte-Beuve says with a better discrimination of that work (yet he might have prefixed *a* to *droite*):

"Ici une réflexion commence à naître. Il manque à cette nature saine, droite, habile, frugale et laborieuse de Franklin un idéal, une fleur d'enthousiasme, d'amour, de tendresse, de sacrifice, tout ce qui est la chimère et aussi le charme et l'honneur des poétiques natures. . . . Il y a une fleur de religion, une fleur d'honneur, une fleur de chevalerie, qu'il ne faut pas demander à Franklin." *

APPENDIX 40E

(II Page 362)

MR. ADAMS seems to have had two minds as to the "perfect good faith" of the Constitution makers:

"Thus intentionally by some of the most far-seeing, unintentionally by others . . . a pious fraud was in 1788 perpetrated on the average American, and his feet were directed into a path which inevitably led him to the goal he least designed for his journey's end." †

One wonders whether Mr. Samuel Adams was only "the average American," or one "of the most far-seeing" when, in the Massachusetts Ratifying Convention, speaking of the Tenth Amendment, he declared:

"Your Excellency's first proposition is, 'that it be explicitly declared, that all powers not expressly delegated to Congress are reserved to the several States . . . ' This appears to my mind, to be a summary of a bill of rights . . . It . . . gives assurance that, if any law made by the Federal Government shall be extended beyond the power granted by the proposed Constitution and inconsistent with the Constitution of this State, it will be an error . . . It is consonant with the second article in the present Confederation, that each State retains its Sovereignty," etc. ‡

* "Causeries de Lundi."

† "The Ethics of Secession," in "Studies Military and Diplomatic," by Charles Francis Adams; N. Y., 1911.

‡ Elliot, Vol. II, pp. 130, 131.

One also wonders whether a Court would not declare a contract valid, in so far as the obvious understanding with which it was entered on by "the average" citizen—even if misled by "the most far-seeing."

APPENDIX 40F

(II Page 367)

"BUT, as I went back to the deeper underlying influences, . . . The elaborate legal arguments, the metaphysical theories and historical disquisitions,—even the rights and wrongs of the case,—became quite immaterial, and altogether insignificant. In obedience to underlying influences, and in conformity with natural laws, a system is crystallizing. Discordant elements blend; assimilation, willing or reluctant, goes on. . . . With much confidence, I assert, in its fundamentals there was no right or wrong about it; it was an inevitable, irrepressible conflict, . . . That shield did actually have a silver as well as a golden side." *

To such a view only one answer seems apposite. It may be true. But if so, it covers every violation of received ethic. The action of the country which tears up the scrap of paper on which a treaty is written; that of its soldiers who murder women and children; that of the Inquisition; of "the magnate of finance and industry" who, by ruthless fraud, accumulates unneeded millions at the expense of poverty; those of the pick-pocket who relieves Mr. Adams of his watch, or of the burglar who takes his life,—all and every are the result of "natural laws"; and come under the soothing ægis which Mr. Adams would extend over "the drama" in question—if we look upon that side of the shield. But, as Mr. Adams says, there is another side to the shield. It is not thought it can be better presented than in the words of Lord Acton:

* "The Ethics of Secession," in "Studies Military and Diplomatic," by Charles Francis Adams; N. Y., 1911.

"The inflexible integrity of the moral code, is to me the secret of the authority, the dignity, the utility of history."

Whether there is such a thing as "right" and "wrong" must of course be answered according to the metaphysic of the answerer. But it is merely a question of logic that, if there is, the question at issue falls under it very positively; that if that question does not fall under the laws of right and wrong, neither does any other act of man.

APPENDIX 40G

(II Page 370)

"WILLIAM RAWLE was in his day an eminent Philadelphia lawyer, and chancellor of the Law Association of Philadelphia. The principal author of the revised code of Pennsylvania, he stood in the foremost rank of American legal luminaries in the first third of the nineteenth century. His instincts, sympathies and connections were all national. His *View of the Constitution*, published in Philadelphia in 1825, was the standard text-book on the subject until the publication of Story's *Commentaries*, in 1833. It has been asserted that Rawle's *View* was used as a text-book for the instruction of the students at West Point until after the year 1840." (See prefatory matter to republication of paper entitled 'Sectional Misunderstandings,' by Robert Bingham, in *North American Review* of September, 1904; also the paper entitled 'Was Secession Taught at West Point,' read at the meeting, May 5, 1909, of the Military Order of the Loyal Legion of the United States Commandery of the State of Pennsylvania, by Lieut. Colonel James W. Latta.)

"If a faction should attempt to subvert the government of a State for the purpose of destroying its republican form, the paternal power of the Union could thus be called forth to subdue it. Yet it is not to be understood that its interposition would be justifiable if the people of a State should determine

to retire from the Union, whether they adopted another or retained the same form of government.' (Page 289.)

" 'The States, then, may wholly withdraw from the Union; but while they continue they must retain the character of representative republics.' (Page 290.)

" 'The secession of a State from the Union depends on the will of the people of such State. The people alone, as we have already seen, hold the power to alter their constitution.' " *

"When the Federal Constitution was framed and adopted,—an indissoluble Union of indestructible States,—what was the law of treason,—to what or to whom, in case of final issue, did the average citizen owe allegiance? Was it to the Union or to his State? As a practical question, seeing things as they then were,—sweeping aside all incontrovertible legal arguments and metaphysical disquisitions,—I do not think the answer admits of doubt. If put in 1788, or indeed at any time anterior to 1825, the immediate reply of nine men out of ten in the northern States, and of ninety-nine out of a hundred in the southern States, would have been that, as between the Union and the State, ultimate allegiance was due to the State.

"A recurrence to the elementary principles of human nature tells us that this would have been so, and could have been no otherwise. . . . The thing hardly admits of discussion. The change was political and far-reaching; but it produced no immediate effect on the feelings of the people. . . . So with us in 1788, allegiance to State had only a few years before proved stronger than allegiance to the Crown or to the Confederation, and no one then was 'foolish enough to suppose that' the executive of the Union 'would dare enforce a law against the wishes of a sovereign and independent State'; the very idea was deemed 'preposterous.' 'That this new government, this upstart of yesterday, had the power to impose its edicts on unwilling States was a political solecism to which they could in no wise assent.' . . . Though, I say, Mr. Lodge and Dr. Smith may be wrong, yet whether they were wrong or right does not affect the proposition that, from 1788 to 1861, in

* Charles Francis Adams, "Lee's Centennial," "Studies, Military and Diplomatic," pp. 339, 340; N. Y., 1911.

case of direct and insoluble issue between sovereign State and sovereign Nation, every man was not only free to decide, but had to decide the question of ultimate allegiance for himself; and, whichever way he decided, almost equally good grounds in justification thereof could be alleged. The Constitution gave him two masters. Both he could not serve; and the average man decided which to serve in the light of sentiment, tradition, and environment. Of this I feel as historically confident as I can feel of any fact not matter of absolute record or susceptible of demonstration." *

APPENDIX 40H

(II Page 370)

" . . . was occupied by thirteen farmers . . . They asked me if they were known in Europe, and if it was there I had bought my maps. On my assuring them that we knew America as well as the countries adjoining to us, they seemed much pleased; but their joy was without bounds, when they saw New Hampshire, their country, on the map." †

"The history of New England, containing an impartial account of the civil and ecclesiastical affairs of the country to the year . . . 1700." By Daniel Neale, L., 1720.

"Notice is hereby given . . . that Charles Dutens . . . near the Indian King, Philadelphia, continues their business of making all sorts of jewels . . .

"N. B. We have the pleasure of informing our customers, that we . . . find that this country crystal is full as good as that of Bristol stone; and we hope those who love their country produce . . . will encourage us by their custom. . . ." ‡

"I was chosen a member of the first Convention of Pennsylvania: that body far from deeming me an enemy to my coun-

* Charles Francis Adams, "The Ethics of Secession," "Studies, Military and Diplomatic," pp. 212-215; N. Y., 1911.

† Chastellux, "Travels in North-America, 1780-1782," Vol. I, p. 60; L., 1787.

‡ "Pennsylvania Gazette," September 18, 1755.

try, recommended me . . . to the Assembly . . . My country, however did not entertain a worse opinion of me on that account, and I was chosen a member of the second Convention . . . The voice of my country soon called me into another line; I was appointed one of your Delegates in Congress," etc.*

"The virtuous, the enlightened, the patriotic Convention of the State of Virginia. That body which, with one voice, dared to declare their country Independent, and to propose a similar declaration to their sister States. . . .

"To the memory of Edmund Pendleton: President of that Convention which raised his country to the rank of an Independent State." †

"For notwithstanding all the publick virtue which is ascribed to those people [*i. e.*, of Massachusetts] there is no nation under the sun . . ." ‡

"Addresses are sometimes look'd upon as Matter of mere Form and Compliment, and perhaps to such who make Use of Power only to serve themselves and promote their own particular Interests, they can consist of little else; but he must be a Stranger to our Charter, and the singular Privileges we enjoy, who suspects of Insincerity the highest Expressions of Gratitude, from the People of Pennsylvania to their Proprietors.

"What now seems most necessary to increase the Happiness of a Country, possessed of so many Advantages, is the promoting of Knowledge and Virtue, that the Inhabitants may know how to esteem those Advantages as they ought, and appear not unworthy of them. To which End, the Erecting a Publick Library in this City, we hope may in some Measure contribute." §

* Letter of James Wilson to citizen of Pennsylvania, "Pennsylvania Journal," October 18, 1780.

† Toasts at a public dinner, Williamsburg, 15th May, 1807. "Report of Jubilee at Jamestown; together with the proceedings at Williamsburg on the 15th, the day when the Convention of Virginia . . . declared her independent"; Petersburg, 1807.

‡ Washington to Joseph Reed, February 10, 1776.

§ Address from Library Company of Philadelphia to John Penn, "Pennsylvania Gazette," June 5, 1735.

Thomas Jefferson, writing to David Rittenhouse, says:

"Your time for two years past has, I believe, been principally occupied in the civil government of your country [*i. e.*, Pennsylvania]." *

"Several Thousand Inhabitants of this Province, who not having the Honour of being born in it, consequently fall under the opprobrious Denomination of Birds of Passage, do present their most respectful Compliments to Publicus, and return him their Thanks, for so justly representing their Sentiments in his late Publication, by supposing them possessed of such Principles of Philanthropy and Gratitude, 'as to esteem every Country where they chance to alight equally their own;' they assure him he has not mistaken their true Sentiments, and should esteem themselves extremely unworthy of the Protection and Support, which they have experienced in this Country, did they not acknowledge these Principles, and declare themselves ready to defend the Rights and Privileges of this hospitable Province, even with their Blood, if necessary. And they further declare their utter Abhorrence of those illiberal Wretches, who would cause Distinctions, destructive of Harmony and universal Benevolence, between themselves and the Children of those, who were Birds of Passage before them." †

"General Lee then concluded by intreating gentlemen to pause. Take this one rash step, said he, and you will be carried step by step till you land in misery, or submit quietly with derision settled upon your heads. Should my efforts, Mr. Chairman, be unavailing, I shall lament my Country's fate, and acquiesce in my Country's will; and amidst the surrounding calamities, derive some consolation from recollecting my humble exertions to stop the mad career." ‡

"For God sake keep our Troops together and keep them out of this Damned Country [*i. e.*, Massachusetts] if Possible." §

* Letter of 1778.

† "*Pennsylvania Gazette*," January 13, 1773.

‡ Resolutions of Virginia, and Debates in the House of Delegates of Virginia. December 20, 1798.

§ Letter of Col. Wm. Thompson of the Penna. Rifle Battalion, Camp of Prospect Hill (before Boston), Jan. 25, 1776. "*Pennsylvania Magazine*," Vol. XXXV, p. 305; 1908.

"You may inform all your acquaintances not to be afraid that they [the New Englanders] will ever Conquer the other Provinces (which you know was much talked of), 10,000 Pennsylvanians would I think be sufficient for ten times that number out of their own Country." *

"The ill opinion of Jefferson, and jealousy of the ambition of Virginia, is no inconsiderable proof of good opinion in that country [New England]." †

"But to see a government, in large and populous countries, settled from its foundation by deliberate counsel," etc. ‡

"To thy questions on the state of our country [*viz.* Penna.] its . . . agreed to be as healthy as most of our neighbouring provinces"—"not to send any more (negroes) . . . as the generality of our people are against any more coming into the country" (Penna.).§

APPENDIX 40I

(II Page 370)

"WE have never closed the list of states composing the Union, in which we differ from most other confederacies, ancient or modern; we admit freely those who are foreigners by birth to our citizenship, and we do not believe in inalienable allegiance." ||

It may be admitted that there is a difference between a single immigrant or even a number of immigrants, and an entire community. Yet even the publicists who wrote under the older ideas of sovereignty, the right of princes, etc., have found it uneasy to frame a positive rule upon the point. ||

* "Pennsylvania Magazine of History," Vol. XXXI, p. 135; 1907.

† Alexander Hamilton, "Works," Vol. VII, p. 851. This quotation is retained though there is some inaccuracy as to the authority.

‡ President Witherspoon, quoted by Abiel Holmes in Sermon, February 19, 1795, pp. 9-10; Boston, 1795.

§ MSS. letters of Jonathan Dickinson. pp. 8, 1715, in Ridgway Br. Liby. Co. of Phila.

|| Francis Lieber, "On Civil Liberty and Self-Government," Vol. I, p. 285; 1853.

¶ *E.g.*, Burlamaqui, "Principles of Politic Law" Chapter V; L. 1752, etc., etc. Cf. also Appendix 31D.

APPENDIX 41

(I Page 99)

Is Mr. Chamberlain entirely sure that these moral convictions were entirely "settled?" An eminent gentleman from his own State, Mr. Charles Francis Adams, seems to have undergone a certain unsettling of his convictions with experience.*

And again:

"Now, as compared with ourselves, the Southern people have a dead-weight of Africanism tied to them, which is tending perpetually to hold back or pull down. It may seem heterodox, perhaps it will be stigmatized as pessimistic to say so, but I have myself little doubt that, if left to themselves . . . even the most advanced types of the African race on this continent, taken as a mass, would tend steadily to deteriorate,—they would sensibly gravitate towards the normal African condition. In other words, it is not a self-sustaining, much less an inherently advancing human species. It is held up to any standard to which it is brought by the presence and influence of the white man. Meanwhile, on the other hand, it acts as a dead-weight on the uplifting race, tending steadily to diminish its forward impetus, even if it does not produce direct deterioration . . . The African does not originate, he is imitative. It is so in dress, in manners, and, to a certain extent, in morals. In all these respects an increasing separation of the two species, living perforce not side by side but together, is bad for both. From what I saw and heard I should apprehend that the great future handicap of the South would be the presence in its civilization of a vast, imperfectly assimilated mass of barbarism veneered." †

If Mr. Adams considers that there "was no right or wrong" ‡ about the action, which brought about this state of

* *Vide* Appendix 36.

† "The Ethics of Secession," in "Studies Military and Diplomatic," by Charles Francis Adams; N. Y., 1911.

‡ *Vide* Appendix 40F.

affairs,—a state of affairs concerning which he “does not hesitate to say” that it “involved a problem in the face of which . . . to-day I stand appalled” *—one must wonder in what earthly affair right and wrong would be apparent to him.

“This was to fulfil the prophecy:”

“The case of slavery helps to illustrate the federal line, and to refute the doctrine of a national supremacy. A federal compact, and not an American nation, caused slaves to be counted in adjusting a federal representation. A national representation would not have been in any degree deduced from slaves. Independent of other circumstances, slavery demonstrated the necessity of a line between state and federal powers. An usurped federal supremacy could as easily get over it in this case, as in those of banks, lotteries, and an appellate jurisdiction; and there would be less difficulty in proving that slavery, abstracted from local circumstances, is prejudicial to the welfare of the United States, than that banks, lotteries, and the appellate jurisdiction, will advance it. The states ignorant of facts, might be enchanted with the theory of converting black slaves into good patriots, whilst the states experimentally qualified to judge, might know that the idea was visionary.” †

APPENDIX 42

(*I Page 108*)

WHO was it spoke of justice? Is it justice which speaks in the perversions of historic fact which have been cited? was it justice which urged Mr. Emerson and other New England illuminati to finance the John Brown raid? A list of similar teachings of “justice” would be far too long to append here. But one instance will sufficiently summarize the question. A book appeared in 1857, “The Impending Crisis,” by Hinton R. Helper; the following matter is extracted therefrom:

* *Vide* Appendix 36.

† John Taylor, of Caroline.

"With regard to the unnational and demoralizing institution of slavery, we believe the majority of Northern people are too scrupulous. They seem to think that it is enough for them to be mere free-soilers, to keep in check the diffusive element of slavery, and to prevent it from crossing over the bounds within which it is now regulated by municipal law. Remiss in their *national* duties, as we contend, they make no positive attack upon the institution in the Southern States. Only a short while since, one of their ablest journals—the *North American* and *United States Gazette*, published in Philadelphia—made use of the following language:—

"'With slavery in the States, we make no pretence of having anything politically to do. For better or for worse, the system belongs solely to the people of those States; and is separated by an impassable gulf of State sovereignty from any legal intervention of ours. We cannot vote it down any more than we can vote down the institution of caste in Hindostan, or abolish polygamy in the Sultan's dominions. Thus, precluded from all political action in reference to it, prevented from touching one stone of the edifice, not the slightest responsibility attaches to us as citizens for its continued existence. But on the question of extending slavery over the free Territories of the United States, it is our right, it is our imperative duty to think, to feel, to speak and to vote. We cannot interfere to cover the shadows of slavery with the sunshine of freedom, but we can interfere to prevent the sunshine of freedom from being eclipsed by the shadows of slavery. . . .'

"In this extraordinary crisis of affairs, no man can be a true patriot without first becoming an abolitionist. (A free-soiler is only a tadpole in an advanced state of transformation; an abolitionist is the full and perfectly developed frog.) And here, perhaps, we may be pardoned for the digression necessary to show the exact definition of the terms abolish, abolition and abolitionist. . . .

"'Abolitionist, n. A person who favors abolition, or the immediate emancipation of slaves.'

"There, gentlemen of the South, you have the definitions of the transitive verb abolish and its two derivative nouns, aboli-

tion and abolitionist; can you, with the keenest possible penetration of vision, detect in either of these words even a title of the opprobrium which the oligarchs, in their wily and inhuman efforts to enslave all working classes irrespective of race or color, have endeavored to attach to them? We know you cannot; abolition is but another name for patriotism, and its other special synonyms are generosity, magnanimity, reason, prudence, wisdom, religion, progress, justice, and humanity. . . .

"So it seems that the total number of actual slave-owners, including their entire crew of cringing lickspittles, against whom we have to contend, is but three hundred and forty-seven thousand five hundred and twenty-five. Against this army for the defense and propagation of slavery, we think it will be an easy matter—independent of the negroes, who, in nine cases out of ten, would be delighted with an opportunity to cut their masters' throats, and without accepting a single recruit from either of the free States, England, France, or Germany—to muster one at least three times as large, and far more respectable for its utter extinction. We hope, however, and believe, that the matter in dispute may be adjusted without arraying these armies against each other in hostile attitude. We desire peace, not war—justice, not blood. Give us fair-play, secure to us the right of discussion, the freedom of speech, and we will settle the difficulty at the ballot-box, not on the battle-ground—by force of reason, not by force of arms. But we are wedded to one purpose from which no earthly power can ever divorce us. We are determined to abolish slavery at all hazards—in defiance of all the opposition, of whatever nature, which it is possible for the slavocrats to bring against us. Of this they may take due notice, and govern themselves accordingly. . . .

"That our plan for the abolition of slavery, is the best that can be devised, we have not the vanity to contend; but that it is a good one, and will do to act upon until a better shall have been suggested, we do firmly and conscientiously believe. Though but little skilled in the delicate art of surgery, we have pretty thoroughly probed slavery, the frightful tumor on the

body politic, and have, we think, ascertained the precise remedies requisite for a speedy and perfect cure. . . .

"10th. A Tax of Sixty Dollars on every Slaveholder for each and every Negro in his Possession at the present time, or at any intermediate time between now and the 4th of July, 1863—said Money to be Applied to the transportation of the Blacks to Liberia, to their Colonization in Central or South America, or to their Comfortable Settlement within the Boundaries of the United States.

"11th. An additional Tax of Forty Dollars per annum to be levied annually, on every Slaveholder for each and every Negro found in his possession after the 4th of July, 1863—said Money to be paid into the hands of the Negroes so held in Slavery, or, in cases of death, to their next of kin, and to be used by them at their own option. . . .

"With all our heart, we hope and believe it is the full and fixed determination of a majority of the more intelligent and patriotic citizens of this Republic, that the Presidential chair shall never again be filled by a slavocrat. Safely may we conclude that the doom of the oligarchy is already sealed with respect to that important and dignified station; it now behooves us to resolve, with equal firmness and effect, that, after a certain period during the next decade of years, no slaveholders shall occupy any position in the Cabinet, that no slave-breeder shall be sent as a diplomatist to any foreign country, that no slave-driver shall be permitted to bring further disgrace on either the Senate or the House of Representatives, that the chief justices, associate justices, and judges of the several courts, the governors of the States, the members of the legislatures, and all the minor functionaries of the land, shall be free from the heinous crime of ownership in man. . . .

"From the abstract of our plan for the abolition of slavery, it will be perceived that, so far from allowing slaveholders any compensation for their slaves, we are, and we think justly, in favor of imposing on them a tax of sixty dollars for each and every negro now in their possession, as also for each and every one that shall be born to them between now and the 4th of July, 1863; after which time, we propose that they shall be

taxed forty dollars per annum, annually, for every person by them held in slavery, without regard to age, sex, color, or condition—the money, in both instances, to be used for the sole advantage of the slaves. As an addendum to this proposition, we would say that, in our opinion, if slavery is not totally abolished by the year 1869, the annual tax ought to be increased from forty to one hundred dollars; and furthermore, that if the institution does not then almost immediately disappear under the onus of this increased taxation, the tax ought in the course of one or two years thereafter, to be augmented to such a degree as will, in harmony with other measures, prove an infallible death-blow to slavery on or before the 4th of July, 1876. . . .

“And now, Sirs, we have thus laid down our ultimatum. What are you going to do about it? Something dreadful, as a matter of course! Perhaps you will dissolve the Union *again*. Do it, if you dare! Our motto, and we would have you to understand it, is *the abolition of slavery and the perpetuation of the American Union*. If, by any means, you do succeed in your treasonable attempts to take the South out of the Union to-day, we will bring her back to-morrow—if she goes away with you, she will return without you.

“Do not mistake the meaning of the last clause of the last sentence; we could elucidate it so thoroughly that no intelligent person could fail to comprehend it; but, for reasons which may hereafter appear, we forego the task.”

This plan of wholesale proscription, confiscation, murder, insurrection, war, and defiance of all legal and moral obligation, was not the singular frenzy of a fanatic or scoundrel. It was endorsed formally by the leaders of public opinion in the North. The *New York Tribune* devoted to it some seven columns. The Republicans tried to elect Mr. John Sherman (who, with some seventy members of Congress, had endorsed it), Speaker. The United States Government later set the seal of its approval to the work, in the shape of a Consular appointment to its author. Probably it would have been vain to have preached justice. Few tried.

APPENDIX 43

(I Page 108)

"So, too, I believe the views of many politicians have been not a little coloured by the doctrines of moral philosophy, which have of late years been widely popular, which reduce our conceptions of right and wrong, of justice or injustice, to mere general utility, or a calculation of interests. Philosophy has its fanatics as well as religion, and to this conception of ethics may be largely traced the utter unscrupulousness in dealing with the rights of minorities which is sometimes found among men who are certainly not mere unprincipled self-seekers." * 43½ (v. p. 414.)

APPENDIX 44

(I Page 110)

It is apposite to continue the citation from Mr. Ames (a Massachusetts man, and influential member of the Federal Convention) for the purpose of showing his idea (and that of the Americans of his time) of the duty of citizens towards government.

"Every individual has a right to tell his rulers, I am one of the parties to the constitutional contract. I promised allegiance, and I require protection for my life and property. I am ready to risk both in your defence. I am competent to make my own contracts; and when they are violated, to seek their interpretation and redress in the judicial courts. I never gave you a right to interpose in them. Without my consent, or a crime committed, neither you, nor any individual, have a right to my property. I refuse my consent; I am innocent of any crime. I solemnly protest against the transfer of my property to my debtor. An act making paper, or swine, a

* Lecky, "Democracy and Liberty," Vol. I, p. 225; N. Y., 1896.

tender, is a confiscation of my estate, and a breach of that compact, under which I thought I had secured protection. If ye say that the people are distressed, I ask, is the proposed relief less distressing? Relieve distress from your own funds; exercise the virtues of charity and compassion at your own charge, as I do. Am I to lose my property, and to be involved in distress, to relieve persons whom I never saw, and who are unworthy of compassion, if they accept the dishonest relief? If your virtues lead you to oppress me, what am I to expect from your vices? But if ye will suffer my life to depend upon the mercy of the MOB, and my property upon their opinion of the expediency of my keeping it, at least restore me the right, which I renounced when I became a citizen, of vindicating my own rights, and avenging my own injuries.

"But, if the constitution must fall, let us discharge our duty, and attempt its defence. Let us not furnish our enemies with a triumph, nor the dishonoured page of history with evidence, THAT IT WAS FORMED WITH TOO MUCH WISDOM TO BE VALUED, AND REQUIRED TOO MUCH VIRTUE TO BE MAINTAINED BY ITS MEMBERS." *

APPENDIX 45

(I Page 111)

"*Obsta principiis* was the governing maxim, when we resisted oppression by the mother country—an oppression rather in *prospect* than in *action*." †

"The fundamental principle of the Revolution was, that the colonies were co-ordinate members with each other, and with Great Britain, of an empire, united by a common executive sovereign, but not united by any common legislative sovereign. The legislative power was maintained to be as complete in each

* Written in 1786, on occasion of Shay's Rebellion. "Influences of Democracy on Liberty," &c., pp. 111-112; London, 1835.

† Pickering to Hillhouse, December 16, 1814; Henry Adams, "New England Federalism," pp. 4, 5; B., 1877.

American parliament, as in the British parliament. . . . A denial of these principles by Great Britain, and the assertion of them by America, produced the Revolution." *

"In other countries, the people, more simple and of a less mercurial cast, judge of an ill principle in government only by an actual grievance; here [*i. e.*, the American Colonies] they anticipate the evil, and judge of the pressure of the grievance by the badness of the principle. They augur misgovernment at a distance; and snuff the approach of tyranny in every tainted breeze." †

"Our Revolution was mainly directed against the mere theory of tyranny. We had suffered comparatively little; we had, in some respects, been kindly treated; but our intrepid and intelligent fathers saw, in the usurpation of the power to levy an inconsiderable tax, the long train of oppressive acts that were to follow. They rose; they breasted the storm," etc. ‡

"The Acts are not yet repeal'd, nor will be this Sessions of Parliament *unless* the Americans recognize the Legality of them, which is all the Ministry want, but which I am inclin'd to believe will not be granted. God only knows how and where it will terminate—the Legislature of this Country is *determin'd* at any Risque to maintain its Supremacy over the Colonies." §

"Nor was it only in this that we discern their disinterestedness, their heroic forgetfulness of self. Not only was the independence, for which they struggled, a great and arduous adventure, of which they were to encounter the risk, and others to enjoy the benefits; but the oppressions, which roused them, had assumed, in their day, no worse form than that of a pernicious principle . . . They were not slaves, rising in desperation, but free men snuffing from afar 'the tainted gale of tyranny.'" ||

* Madison's Report on the Virginia Resolutions.

† Burke's Speech "On Conciliation of the Colonies," 1775.

‡ Clay, "On the Emancipation of South America," March 24, 1818.

§ "Extract from MS. Letter from Henry Cruger, jr. Bristol, March 25, 1769. Preserved in Ridgway Library.

|| Everett, "The Issue of the Revolution," Address at Cambridge, July 4th, 1826.

"Those illustrious statesmen and patriots had been, many of them, deeply engaged in the discussions which preceded the war of our revolution, and all of them were well read in those discussions. The right to regulate commerce, even by the imposition of duties, was not controverted; but the right to impose a duty for the purpose of revenue produced a war as important, perhaps, in its consequences to the human race, as any the world has ever witnessed." *

"Theoretical and actual tyranny generally subsist together, but they are not inseparable. Actual liberty may subsist with theoretical tyranny, and actual tyranny with theoretical liberty. These States when British Provinces, were a proof of the first position, and revolutionary France of the second. Liberty and tyranny are neither of them inevitable consequences of any form of government, as both depend, to a great extent, upon its operations, whatever may be its form. All that men can accomplish, is to adopt a form, most likely to produce liberty, and containing the best precautions against the introduction of tyranny. An absolute monarch may occasionally dispense liberty and prosperity to a nation, and a representative government may occasionally dispense fraud and oppression. Such events under both forms of government, may be rare, but history proves that they are possible. If liberty consists in cutting off heads, the United States are as free as any other countries, but not more free than some; if in not transferring property by unnecessary taxation and exclusive privileges, they are less free than when they were provinces, and have nothing to boast of when compared with some other countries. As provinces, both their heads and their property were safe for nearly two centuries; . . . " †

Even back of the stated cause of revolution one may catch glimpses of another worth noting if only because little, if at all, adverted to by historians:

* Marshall's opinion in *Gibbons vs. Ogden*.

† John Taylor, of Caroline, "Tyranny Unmasked," pp. 252, 253; Washington, 1822. One wonders what Mr. Taylor would think of our present theory and scale of taxation.

"But we are not to suppose, that the laying on a tax emancipated a continent, how much soever it may have contributed to accelerate the event. This would be against that rule in philosophy, which requires effects to be solved by competent causes. The truth is, America was of age to be free and determined to be in fact independent. The attempt to keep her much longer in restraint, even had no effort at impost been made, would have been as preposterous, as to keep manhood in leading strings. When the child has strength to go alone, the arms of the mother must be content to give it up. The principle, that broke our bands, was growth; a principle as inexplicable, as how the plant vegetates or life is sustained." *

The author quotes a prophecy of the early 18th century to this effect, *viz.*:

"A pamphlet of the Abbé, entitled, 'The Interests of England Ill Understood,' has the following passage. 'England, which seems now in the full tide of success, may end by getting possession of the whole American continent; but when this great region shall come to be peopled in a great measure at the expense of the mother country, what line of conduct will England then pursue? Will a free communication with all the world be permitted? and will the Americans be allowed to pursue their own interests, paying no taxes but those of their own imposing, and bound by the acts of the English parliament so far only as they may think proper to adopt them, and at liberty to give the preference to their own manufactories?' 'If the government of England, actuated by the only principle, which can lead to the establishment of colonies, by a desire of promoting national interests, should think of governing as the Spanish court does and treating the people of the colonies like conquered subjects; rely upon it, that this fine and fertile country, at the distance of 2000 leagues, and peopled by men of English minds, will not long submit! They will have inherited too high a sense of their rights as freemen, not to be desirous of throwing off such a yoke, and their very rapid prosperity, their increase in wealth and numbers, and their

* Alexander Townsend, "Oration," July 4, 1810, p. 15; Boston, 1810.

improvement in every art and science will soon enable them to do so.' For this extract the writer is happy to own his obligation to 'The Port Folio.' Abbé Du Bos (1711)."

The political insight of Napoleon I is undeniable; and a manuscript letter of 1827, of Mark Wilkes (in the Ridgway Library) gives his opinion, curiously similar in terms to those of Mr. Townsend.

"I said casually 'that (America) will be a great country if she hold together.' 'Yes' (said he) 'granting you 'if', in another century, or less, she will effect an entire change in the face of the whole world. She has thriven upon our follies.' Determined not to misapprehend him I added 'yes, the follies of France and England, in treating her with injustice.' 'What,' said he, 'are you one of those who think you might have kept her? No. No, the youth must become a man, the period must arrive when the boy ceases to sleep with his mother' . . . an authentic anecdote marks the peculiar manner of the man, and I thought would be acceptable to you."

One finds occasional mutterings to the same effect in newspapers, *e. g.*:

"The Massachusetts, though made such a Bugbear, as if its inhabitants were so rich and numerous, as they might one Day be able to dispute Dominion with England, is not as large as Yorkshire, nor has Half so much arable Land. Supposing the Colonies were grown rich and powerful, what Inducement have they to throw off their Independency? National Ties of Blood and Friendship, mutual Dependencies for Support and Assistance in their Civil and Military Interests, with England; each Colony having a particular Form of Government of its own, and the Jealousy of any one's having the Superiority over the rest, are unsurmountable Obstacles to their ever uniting, to the Prejudice of England, upon any ambitious Views of their own. But, that repeated and continued ill Usage . . . &c." *

Lord Acton's remark is thus verified, that

* *Pennsylvania Gazette*, December 28, 1758.

"The story of the revolted colonies impresses us first and most distinctly as the supreme manifestation of the law of resistance, as the abstract revolution in its purest and most perfect shape. No people was so free as the insurgents; no government less oppressive than the government which they overthrew . . . Their example . . . teaches that men ought to be in arms even against a remote and constructive danger to their freedom; that even if the cloud is no bigger than a man's hand, it is their right and duty to stake the national existence, to sacrifice lives and fortunes, to cover the country with a lake of blood, to shatter crowns and fling parliaments into the sea," etc.*

But the people of the Southern States had, as has been seen from the statements of anti-secessionists, far more than "snuffed the tainted gale of tyranny." Openly denied the fulfilment of the compact under which they had entered the Union, they had either to remain therein, as confessed inferiors, or to assert their rights as equals, and leave it.

APPENDIX 46

(I Page 112)

"HERETICAL doctrines maintained in Senate . . . That there is in every legal body of men a right of self-preservation, authorizing them to do whatever is necessary for that purpose." †

"The doctrine 'that nations ought to stick by their governments' right or wrong, is apocryphal where the sovereignty of the people exists. Are governments the best judges of national interest? No. The most honest? No. How are the degrees of liberty and tyranny graduated? From free discussion and national will, down to passive obedience. . . . Election was not instituted upon the principle of standing blindly by government, but to enable the people not to stand by it." ‡

* "The American Commonwealth."

† March, 1800, Jefferson, "Anas," N. Y., 1903.

‡ Letters of John Taylor, of Caroline, to Thomas Ritchie, Number V; 1809.

"It is said, that some supreme power is *necessary* to prevent collisions. A saying of the Marquis of Halifax (a man renowned for understanding) recorded by Wrangham, fits our case. 'The word *necessary*, is miserably applied; it disordereth families and overturns governments by being abused.' " *

Moreover, Mr. Kent's phraseology inverts the proposition which properly stated, as regards the case at issue, was "That no people worthy of the name will allow itself to be destroyed because of the *disregard* of Constitutional restraints." (v. 46½, p. 414.)

The men who made the Constitution had very different ideas of the sanctity and benevolence of government, from those who to-day expound it.

"To prevent the peace, safety and happiness of the people from being endangered, political orthodoxy teaches that they ought never to delegate a power which they can exercise with convenience themselves." (Pennsylvania, in Relation to the Bank, 1819.) It is unnecessary to cite examples of the present tendency to reverse this teaching: they are too continuously at one's pocket.

APPENDIX 47

(I Page 114)

"THERE is, therefore, no liberty but liberty under law. Law does not restrict liberty; it creates the only real liberty there is—for liberty in any real sense belongs only to civilized life and to educated men. The sphere of it is not in the beast-like non-reflection of savages; it is in the highest self-determination of fully educated and responsible men. It belongs to defined rights, regulated interests, specified duties, all determined in advance, before passions are excited and selfishness engaged, prescribed in solemn documents, and guaranteed by institutions which work impersonally without fear or favor. Such are the institutions under which we live. Their integrity is worth more to us than anything else in the domain of poli-

* John Taylor, of Caroline, "Construction Construed," p. 169; Richmond, 1820.

tics; their improvement, that they may perform their functions better, is the highest political task of our civilization. That is why liberty in its true sense is worth more than the suppression of intemperance, or the restriction of trusts, or the limitation of corporations, or any other pet reform. Liberty which consists in the equilibrium of rights and duties for all members of the state under the same prescriptions, liberty which secures each man, in and under the laws and constitution, the use of all his own powers for his own welfare, has not therefore the slightest kinship with the spurious liberty of doing as we please, but is the prime condition of happy life in human society. The thing to which it has generally been sacrificed in the past has been "the reason of state"; that is, some other object than the happiness of men, an object selected and imposed upon the society by some arbitrary political authority. There is a modern abuse which is exactly parallel to this, and which consists in using the law to impose pet social aims on society, which use up the time and energy of the citizens in other aims than those chosen by themselves for their own happiness. Thus the most difficult problem in respect to liberty under law is now what it has always been, to prevent the law from overgrowing and smothering liberty." *

"Mankind have talked and written for ages about liberty, and yet the world is as far from agreeing in a definition of it, as Europe is from settling a balance of power. It is because liberty is made to consist in metaphysical dogma. As a thing of real substance and use, taxation, unmetaphysical taxation, is able to supply us with a correct idea of it. Heavy taxes in peace are unexceptionably political slavery. Liberty and slavery are contrary principles, and therefore liberty does not produce heavy taxes." †

"To divide and restrict power; to secure property; to check the appetite for organic change; to guard individual liberty against the tyranny of the multitude, as well as against the

* William Graham Sumner, "Liberty and Responsibility," in "Earth Hunger, and Other Essays."

† John Taylor, of Caroline, "Inquiry into the Principles and Policy of the Government of the U. S.," p. 285; 1814.

tyranny of an individual as a class . . . were the ends which the great American statesmen set before them." . . .*

APPENDIX 48

(I Page 115)

"LOCKE and others at length discovered, that sovereignty in governments and passive obedience in nations, far from being natural or necessary principles for civil societies, were arbitrary and pernicious notions, capable of being supplanted by opinions more natural; and that civil government, constructed upon different principles, and subjected to responsibility and control, might be made more productive of national happiness. But the natural right of self-government, and the consequent rights of dividing and limiting power, might have slept forever in theory, except for the American revolution; which seems to have been designed by Providence for the great purpose of demonstrating its practicability and effects." †

"Europe seemed incapable of becoming the home of free States. It was from America that the plain ideas that men ought to mind their own business . . . ideas long locked in the breast of solitary thinkers, and hidden among Latin folios—burst forth like a conqueror upon the world they were destined to transform." ‡

APPENDIX 49

(I Page 116)

"I WOULD have every zealous man examine his heart thoroughly, and, I believe, he will often find, that what he calls a zeal for his religion, is either pride, interest, or ill-nature. A man who differs from another in opinion, sets himself above him in his own judgment, and in several particulars pretends to be the wiser person. This is a great provocation to the

* Lecky, "Democracy and Liberty," Vol. I, p. 9, N. Y., 1896.

† John Taylor, of Caroline, "Construction Construed," p. 52; Richmond, 1820.

‡ Lord Acton, "Freedom in Christianity."

proud man, and gives a keen edge to what he calls his Zeal. . . .

"Interest is likewise a great inflamer, and sets a man on persecution under the colour of Zeal. For this reason we find none are so forward to promote the true worship by fire and sword, as those who find their present account in it. . . .

"Ill-nature is another dreadful imitator of Zeal. Many a good man may have had a natural rancour and malice in his heart, which has been in some measure quelled and subdued by religion; but if it finds any pretence of breaking out, which does not seem to him inconsistent with the duties of a Christian, it throws off all restraint, and rages in its full fury. Zeal is therefore a great ease to a malicious man, by making him believe he does God service, whilst he is gratifying the bent of a perverse revengeful temper. For this reason we find, that most of the massacres and devastations which have been in the world, have taken their rise from a furious pretended Zeal.

"I love to see a man zealous in a good matter, and especially when his zeal shews itself for advancing morality, and promoting the happiness of mankind: but when I find the instruments he works with are racks and gibbets, gallies and dungeons; when he imprisons men's persons, confiscates their estates, ruins their families, and burns the body to save the soul, I cannot stick to pronounce of such a one, that (whatever he may think of his faith and religion) his faith is vain, and his religion unprofitable." *

As to the special case:

"The issue of *Fraser's Magazine* for February, 1862, contained (pp. 257-268) a paper by John Stuart Mill entitled 'The Contest in America.' . . . With singular foresight and sagacity, and a remarkable insight into the American situation, Mr. Mill observed in this paper:

"But the parties in a protracted civil war almost invariably end by taking more extreme, not to say higher grounds of principle, than they began with. Middle parties and friends of compromise are soon left behind; and if the writers who so

* *The Spectator*, No. 185.

severely criticize the present moderation of the Free-soilers are desirous to see the war become an abolition war, it is probable that if the war lasts long enough they will be gratified. . . . As long as justice and injustice have not terminated *their* ever-renewing fight for ascendancy in the affairs of mankind, human beings must be willing, when need is, to do battle for the one against the other. I am far from saying that the present struggle, on the part of the Northern Americans, is wholly of this exalted character; that it has arrived at the stage of being altogether a war for justice, a war of principle. But there was from the beginning, and now is, a large infusion of that element in it; and this is increasing, will increase, and if the war lasts, will in the end predominate. Should that time come, not only will the greatest enormity which still exists among mankind as an institution receive far earlier its *coup de grâce* than there has ever, until now, appeared any probability of; but in effecting this the Free States will have raised themselves to that elevated position in the scale of morality and dignity, which is derived from great sacrifices consciously made in a virtuous cause, and the sense of an inestimable benefit to all future ages, brought about by their own voluntary efforts.' " * ^{49A} (v. p. 414.)

Taking this statement as correct, it admits the mixed motives of the war. As to the higher character it assumed (taking it for granted that it did so) the same might be said of every war in historical times. No people ever admits that it is fighting for selfish and wrong motives. Possibly in this hypocrisy lies the best hope of man, as showing in him a persistence of moral feeling which requires appeal thereto, even if upon false grounds, to draw forth his greatest exertion. But is the statement even correct? Mr. Lincoln repeatedly and in the strongest terms denied that the war was fought to abolish slavery: *e. g.*:

"It is true, as you remind me, that in the Greeley letter of 1862 I said: 'If I could save the Union without freeing any

* Charles Francis Adams, "Trans-Atlantic Historical Solidarity," pp. 19-21; Oxford, 1913.

slave I would do it; and if I could save it by freeing all the slaves I would do it,' " etc.*

"The administration accepted the war thus commenced for the sole avowed object of preserving our Union; and it is not true that it has since been, or will be, prosecuted by this administration for any other object. In declaring this I only declare what I can know and do know to be true, and what no other man can know to be false." †

APPENDIX 50

(*I Page 117*)

M. CHASTELLUX says:

"La Morale est une branche de la Philosophie très à la mode depuis quelque tems. . . . Il en est d'elle en général comme de la santé; on ne s'en occupe beaucoup que lorsqu'on la perdue." ‡

"In order to do justice to all parties in this controversy we should take especial notice of the amount of opposition to slavery about 1825 in what were afterwards called the Border States. Here all manual labour could have been done by whites; and much of it was actually, especially in Kentucky. There slaves never formed a quarter of the population; and in Maryland they sank steadily from one-fourth in 1820 to one-eighth in 1860. Of masters over twenty or more bondmen in 1856, there were only 256 in Kentucky and 735 in Maryland. It was these large holders who monopolised the profits, as they did the public offices. White men with few or no slaves had scarcely any political power; and their chance to make money, live comfortably, and educate their children, was much less than if all labour had become free. Such a change would have made manufacturing prosper in both Ken-

* Draft of letter to C. D. Robinson, Aug. 17, 1864.

† Draft of letter to J. M. Schermerhorn, September 12, 1864.

‡ "Voyages."

tucky and Maryland; but all industries languished except that of breeding slaves for the South. The few were rich at the expense of the many. Only time was needed in these and other States to make the majority intelligent enough to vote the guilty aristocrats down.

"Two thousand citizens of Baltimore petitioned against admitting Missouri as a slave State in 1820; and several avowed abolitionists ran for the Legislature shortly before 1830. At this time there were annual antislavery conventions in Baltimore, with prominent Whigs among the officers, and nearly two hundred affiliated societies in the Border States. There were fifty in North Carolina, where two thousand slaves had been freed in 1825, and three-fifths of the whites were reported as favourable to emancipation. Henry Clay was openly so in 1827; and the Kentucky Colonization Society voted in 1830 that the disposition towards voluntary emancipation was strong enough to make legislation unnecessary. The abolition of slavery as 'the greatest curse that God in his wrath ever inflicted upon a people' was demanded by a dozen members of the Virginia Legislature, as well as by the Richmond *Enquirer*, in 1832; and similar efforts were made shortly before 1850 in Kentucky, Delaware, Maryland, Western Virginia, Western North Carolina, Eastern Tennessee, and Missouri.

"From 1812 to 1845 the Senate was equally divided between free and slave States; and any transfer, even of Delaware, from one side to the other would have enabled the North to control the upper House as well as the lower. The plain duty of a Northern philanthropist was to co-operate with the Southern emancipationists and accept patiently their opinion that abolition had better take place gradually, as it had done in New York, and, what was much more important, that the owner should have compensation. This had been urged by Wilberforce in 1823, as justice to the planters in the West Indies; the legislatures of Ohio, Pennsylvania, and New Jersey recommended, shortly before 1830, that the nation should buy and free the slaves; and compensation was actually given by Congress to loyal owners of the three thousand

slaves in the District of Columbia emancipated in 1862. Who can tell the evils which we should have escaped, if slavery could have continued after 1830 to be abolished gradually by State after State, with pecuniary aid from Congress or the North? . . .

"The pro-slavery defeat in 1848 encouraged Southerners who knew the advantage of free labour to agitate for emancipation. The convention held for this purpose in Kentucky, in 1849, was attended by delegates from twenty-four counties; and its declaration that slavery was 'injurious to the prosperity of the Commonwealth,' was endorsed by Southern newspapers. Clay himself proposed a plan of gradual emancipation; and such a measure was called for, according to the *Richmond Southerner* (quoted in Holst's Constitutional History, Vol. III, p. 433), by 'two-thirds of the people of Virginia.' Admissions that 'Kentucky must be free,' that 'Delaware and Maryland are now in a transition, preparatory to becoming free States,' and that 'Emancipation is inevitable in all the farming States, where free labour can be advantageously used,' were published in 1853, at New Orleans, in De Bow's "Industrial Resources of the Southern and Western States" (Vols. I., p. 407; II., p. 310; III., p. 60).

"These considerations justify deep regret that emancipation was not gained peaceably and gradually. Facts have been given to show that it might have been if there had been more philanthropy among the clergy, more principle among the Whigs, and more wisdom among the abolitionists." *

"You cannot state, more strongly than I feel to be true, that this original, ancient, unhappy institution of the slavery of the African races in the Southern States is forever and ever to be deplored. It has been, in the course of our history, as much deplored by the Southern States as by ourselves, and to sixty years ago was more deplored by them than by us.

"When the Constitution of the United States was adopted, the Northern people did not feel the evils of slavery, because it was not among them to any great or growing extent. The

* Frederic May Holland, "Liberty in the Nineteenth Century," pp. 74, 98, 124; N. Y., 1899.

Southern people did feel the evils, because it was among them; and they all thought, and all said, it was an evil entailed upon them by the British Government, for which they were full of lamentation and regret, and if they knew how to get rid of it, they would embrace any reasonable measure to accomplish that end.

"Such were the feelings and such the opinions of the principal men of the South; of such men as Chancellor Wythe, Jefferson, Mason, and other leading men of the South, who were concerned in the formation of the Constitution of the United States. And if you, young men, will look into the history of those times, you will find what I state to be true, that the Southern people were more filled with regret at the existence of slavery than the Northern people were. . . .

"For more than fifty years the Northern States never supposed that they had anything to do with it; but, in process of time, and in the progress of things, public sentiment has changed at the North. There is now a strong and animated, sometimes an enthusiastic, and sometimes a religious feeling, against the existence of slavery in the South. But persons entertaining such feelings and sentiments, as I think, disregard the line of their own duties, and adventure upon fields which are utterly forbidden.

"Ladies and gentlemen, there are in this country Abolition Societies and Abolition Presses; and it is no new thing for me to say, for I said it twenty years ago, and have held the opinion ever since, that, in my opinion, all these things have prejudiced the condition of the slave. Twenty years ago, a convention of the whole people of Virginia was held, to deliberate on changing her Constitution, and there was a free discussion of the policy of liberating the slaves, and of gradual emancipation. The question was freely and openly discussed, and there was no fear, no reserve. I followed, in that respect, the advice of Jefferson and Madison and Marshall, with all of whom I have conversed upon this subject, and all of whom desired to see a way in which the gradual emancipation of the slave population of the South might be accomplished. And as I said, twenty years ago that question was freely and openly

discussed by Marshall and other persons at the convention called by the people of Virginia. Everybody knew what was going on, and it was perfectly safe to come out and maintain, as a general proposition, that it would be for the benefit of the South to provide for the gradual emancipation of the slaves.

"It was about that time that Abolition Societies were established in New England, and, in my opinion, they have done nothing but mischief; they have riveted the chains of every slave in the Southern States; they have made their masters jealous and fearful, and postponed far and far the period of their redemption. This is my judgment; it may not be yours." *

"Then, sir, there are the abolition societies . . . I do not think them useful. I think their operations for the last twenty years have produced nothing good or valuable. . . . I cannot but see what mischief their interference with the South has produced . . . Let any gentleman who entertains doubts on this point, recur to the debates in the Virginia House of Delegates in 1832, and he will see with what freedom a proposition made by Mr. Jefferson Randolph, for the gradual abolition of slavery was discussed in that body. Every one spoke of slavery as he thought of it; very ignominious and disparaging names and epithets were applied to it. The debates in the House of Delegates on that occasion, I believe, were all published. They were read by every colored man who could read, and to those who could not read, these debates were read by others. At that time Virginia was not unwilling or afraid to discuss this question, and to let that part of her population know as much of the discussion as they could learn.

"That was in 1832 . . . these abolition societies commenced their course of action in 1835 . . . they attempted to arouse, and did arouse, a very strong feeling; in other words, they created great agitation in the North against Southern slavery . . . I wish to know whether anybody in

* Webster, Speech at Syracuse, May, 1851, "Webster's Works," Vol. XIII, pp. 410-412.

Virginia can now talk openly as Mr. Randolph . . . and others talked in 1832," etc.*

The following testimony from an intelligent foreigner, which attains to philosophic prophecy, verifies Mr. Webster:

"The slave proprietors in these States are as well aware as any political economist can be, that slavery is a loss instead of a gain, and that no State can arrive at that degree of prosperity under a state of slavery which it would under free labour. The case is simple. In free labour, where there is competition, you exact the greatest possible returns for the least possible expenditure; a man is worked as a machine; he is paid for what he produces, and nothing more. By slave labour, you receive the least possible return for the greatest possible expense, for the slave is better fed and clothed than the freeman, and does as little work as he can. The slave-holders in the Eastern States are well aware of this, and are as anxious to be rid of slavery as are the abolitionists; but the time is not yet come, nor will it come until the country shall have so filled up as to render white labour attainable. Such, indeed, are not the expectations expressed in the language of the representatives of their States when in Congress; but, it must be remembered, that this is a question which has convulsed the Union, and that, not only from a feeling of pride, added to indignation at the interference, but from a feeling of the necessity of not yielding up one tittle upon this question, the language of determined resistance is in Congress invariably resorted to. But these gentlemen have one opinion for Congress, and another for their private table; in the first, they stand up unflinchingly for their slave rights; in the other, they reason calmly, and admit what they could not admit in public. There is no labour in the Eastern States, excepting that of the rice plantations in South Carolina, which cannot be performed by white men; indeed, a large proportion of the cotton in the Carolinas is now raised by a *free white* population. In the grazing portion of these States, white labour would be substituted advantageously, could white labour be procured at any reasonable price.

* Webster, on Clay Compromise, March 7, 1850.

"The time will come, and I do not think it very distant, say perhaps twenty or thirty years, when, provided America receives no check, and these States are not injudiciously interfered with, that Virginia, Kentucky, Delaware, Maryland, North Carolina (and, eventually, but probably somewhat later, Tennessee and South Carolina), will, of their own accord, enrol themselves among the free States." *

"Examining into the question of emancipation in America, the first enquiry will be, how far this consummation is likely to be effected by means of the abolitionists. Miss Martineau, in her book, says, 'The good work has begun, and will proceed.' She is so far right; it has begun, and has been progressing very fast, as may be proved by the single fact of the abolitionists having decided the election in the State of Ohio in October last. But let not Miss Martineau exult; for the stronger the abolition party may become, the more danger is there to be apprehended of a disastrous conflict between the States.

"The fact is that, by the constitution of the United States, the federal government have not only no power to *interfere* or to *abolish* slavery, but they are bound to *maintain* it: the abolition of slavery is expressly *withheld*. The citizens of any State may abolish slavery in their own State; but the federal government cannot do so without an express violation of the federal compact. Should all the States in the Union abolish slavery, with the exception of one, and that one be Maryland, (the smallest of the whole of the States,) neither the federal government, or the other States, could interfere with her. The federal compact binds the general government, 'first, not to *meddle* with the slavery of the States where it exists, and next to *protect* it in the case of runaway slaves, and to *defend* it in case of *invasion* or *domestic violence* on account of it.'

"It appears, therefore, that slavery can only be abolished by the slave State itself in which it exists; and it is not very probable that any class of people will voluntarily make themselves beggars by surrendering up their whole property to satisfy the clamour of a party. That this party is strong, is very

* Captain Marryat, "A Diary in America," Vol. III, pp. 63-65; L., 1839.

true: the stronger it becomes the worse will be the prospects of the United States. In England the case was very different; the government had a right to make the sacrifice to public opinion by indemnification to the slave-holders; but in America the government have not that power; and the efforts of the abolitionists will only have the effect of plunging the country into difficulties and disunion. As an American author truly observes, 'The American abolitionists must trample on the constitution, and wade through the carnage of a civil war, before they can triumph.'

"Already the abolition party have done much mischief. The same author observes, 'The South has been compelled, in self-defence, to rivet the chains of slavery afresh, and to hold on to their political rights with a stronger hand. The conduct of the abolitionists has arrested the improvements which were in progress in the slave States for the amelioration of the condition of the slave; it has broken up the system of intellectual and moral culture that was extensively in operation for the slave's benefit, lest the increase of his knowledge should lend him a dangerous power, in connection with these crusading efforts; it has riveted the chains of slavery with a greatly increased power, and enforced a more rigorous discipline; it has excluded for the time being the happy moral influence which was previously operating on the South from the North, and from the rest of the world, by the lights of comparison, by the interchange of a friendly intercourse, and by a friendly discussion of the great subject, all tending to the bettering of the slave's condition, and, as was supposed, to his ultimate emancipation. Before this agitation commenced, this subject, in all its aspects and bearings, might be discussed as freely at the South as anywhere; but now, not a word can be said. It has kindled a sleepless jealousy in the South towards the North, and made the slave-holders feel as if all the rest of the world were their enemies, and that they must depend upon themselves for the maintenance of their political rights. We say rights, because they regard them as such; and so long as they do so, it is all the same in their feelings, whether the rest of the world acknowledge them or not. And they are, in

fact, *political* rights, guaranteed to them by the constitution of the United States." *

"In 1807, the constitutional period for permitting the slave-trade terminated, and no one dared to propose a revival of this odious traffic, as Calhoun himself once called it. When the first Missouri bill came up in 1819, Calhoun, being in the cabinet, did not take sides actively, but he mildly favored the compromise. In the debate on the bill the anti-slavery party attacked South Carolina, because her slave laws were more severe than those of any other Southern state, but no Southern members rose to say that slavery was good, although all opposed its restriction by the national government. Reid, of Georgia, correctly expressed the Southern attitude when he said: "Believe me, sir, I am not the panegyrist of slavery. It is an unnatural state; a dark cloud which obscures half the lustre of our free institutions! . . . Would it be fair; would it be manly; would it be generous; would it be just, to offer contumely and contempt to the unfortunate man who wears a cancer in his bosom, because he will not submit to cautery at the hazard of his existence?" "

"In 1845 Dr. Henry B. Bascom, of Kentucky, published a pamphlet on Methodism and slavery, which had a large circulation, and in it he said that slavery was generally admitted in the South to be an evil, and that every one would agree to any safe deliverance from it. Most Southerners acknowledged that this was the truth. In September, 1845, Calhoun himself said that up to the last ten years, nearly every one had defended the relations between the races in the South as a necessary evil, which they wished to be rid of as soon as possible. He rejoiced to be able to add that great progress had been made toward what he called sound principles." †

"It seems to me that there could be no greater curse inflicted on us than to be compelled to manage a parcel of negroes . . . Before the abolitionists began to meddle with our affairs, with which they had no business, I remember that it was a common opinion that domestic slavery was at least injudicious, as far

* Captain Marryat, "A Diary in America," Vol. III, pp. 58-62.

† Gaillard Hunt's "John C. Calhoun," pp. 53, 292; Phila., 1907.

as the happiness of the master was concerned. I do believe that if these mad fanatics had let us alone, in twenty years we should have made Virginia a free state. As it is, their unauthorized attempt to strike off the fetters of our slaves have riveted them on the faster. Does this fact arise from the perversity of our natures? I believe that it does, in part . . . But," etc.*

"In Jan. 1843, the Massachusetts Anti-Slavery Society passed the resolution which was afterwards published regularly in the *Liberator* as the Garrisonists' creed. It declared the Union 'a covenant with death and an agreement with hell' which 'should be immediately cancelled.'" †

APPENDIX 2A

(I Page 142)

Mr. Adams was "a very harbitrary gent."

"On the 9th of January, 1776, Mr. Wilson came into the Congress with the king's speech in his hand, complaining that 'the true state of feeling here had been misrepresented in England, and asked that an address should be issued by Congress explaining our position and stating that we had no design to set up as an independent nation.' The motion was adopted by a large majority, Messrs. Cushing, Paine, and Hancock, of the Massachusetts delegation voting for it. John Adams was at home at the time, and the Provincial Convention of Massachusetts was so exasperated by the vote that Cushing was dropped by that body from the list of delegates to the Congress for the ensuing year, Elbridge Gerry being substituted for him. As to Samuel Adams, this vote drove him almost to despair: with this proof of the defection of his colleagues before him, to say nothing of the opinions of the other delegates, he allowed his indignation so to master his prudence that he made the propo-

* Letter of 1840, "Life of Robert Louis Dabney," by Thomas Cary Johnson; Richmond, *circa* 1903.

† Fred. May Holland, "Liberty in the Nineteenth Century," pp. 87, 88; N. Y., 1899.

sition to Dr. Franklin about the establishment of a separate confederacy of which we have spoken. The spectacle of the Congress in which two of its most prominent members are represented as resolving to establish a separate government unless they be permitted to have their own way, is a very sad but a very suggestive one. The truth is, the patience of the delegates from the Middle and the Southern Colonies with their restless brethren was by this time well-nigh exhausted, and the long-suppressed murmurs at New England dictation burst forth in unmistakable tones of protest. The proofs of interference of this kind by the New England delegates who, in concert with a party in this Province, strove to drag us into a premature declaration of independence, were said at that time to have been abundant, and some of them remain. Mr Elbridge Gerry, the new delegate to Congress from Massachusetts, in January, 1776, wrote a letter on this subject shortly after his arrival in Philadelphia, which is very suggestive. 'Since my arrival in this city,' he says, 'the New England delegates have been in continual war with the advocates of the Proprietary interest in Congress and in this Colony. These are they who are most in the way of the measures we have proposed; but I think the contest is pretty nearly at an end,' etc. One loses patience at the coolness with which men who came here to seek our aid in restoring their charter propose as the only means of effecting their object the destruction of our own."

Charles J. Stillé, *Life and Times of John Dickinson*, 1732-1808. Phila., 1891, p. 172-3.

APPENDIX 2B

(*I Page 155*)

"What are the general characteristics of the people of New England?"

"They are an industrious and orderly people . . . they are well informed in general. . . . They are humane and friendly, wishing well to the human race. They are plain and simple

in their manners and on the whole they form perhaps the most pleasing and happy society in the world."

"What is the temper of the people of New England?"

"They are frank and open, not easily irritated but easily pacified. They are at the same time bold and enterprising. The women are educated to housewifery, excellent companions and housekeepers, spending their leisure time in reading books of useful information and rendering themselves not only useful but amiable and pleasing."

"What is the state of science in New England?"

"It is greatly cultivated and more generally diffused among the inhabitants than in any other part of the world."

"What is the character of the Pennsylvanians?"

"Pennsylvania is inhabited by a great variety of people. . . . Many of the yeomanry in some parts of this state differ greatly from the New Englanders, for the former are impatient of good government, order and regularity, and the latter are orderly, regular and loyal."

A System of the Geography of the World . . . for Children and Common Schools, compiled by Nathaniel Dwight. Hartford, Conn., 1807.

(Quoted from Samuel Whitaker Pennypacker, "The Autobiography of a Pennsylvanian." Phila., 1918, pp. 230-231.)

In much later text-books these statements are much amplified.

"I have before me a list of one hundred and fifteen students, Americans, who were admitted to the different Inns of Court from 1760 to the close of the Revolution. This list is a curious and significant one when we arrange these students geographically. South Carolina leads in number, having forty-seven; Virginia has twenty-one; Maryland sixteen; Pennsylvania eleven; New York five; and each of the other States one or two only, that being the whole. . . . It is curious to observe how very small a number of the New England physicians, as well as lawyers were educated in Europe during the eighteenth century. It appears from a 'List of the Graduates of Medicine in the University of Edinburgh', printed . . . 1867, that of

sixty-three Americans who received the Degree of Doctor of Medicine in that university between 1735 and 1788 only one was from New England. . . . The clergy (that is to say, the Congregational ministers), and not the lawyers, were the leaders of public opinion in New England. . . . How, then, did the New England Congregational clergy stand towards the English common and parliamentary law—the violation of which it was claimed by the leaders in the other Colonies was our great grievance? The natural course of opposition to the acts of the ministry would have been to convince those who had the control of the government either that they were exceeding their authority or that their acts were wholly unjustified by the English theory of colonial law or by the precedents and practice under it. But they disdained to rest their case upon the allegation that the acts complained of were mere violations of positive written law, or even of provisions of their own charters. There seemed to be always a lurking feeling that although their charters were violated, yet, after all, their rights rested upon something above and beyond English law; in other words that they possessed certain natural rights, founded, as they asserted, on the principles of what was called natural equity. . . . In a word they were jealous from the beginning of any control of their wishes by either royal or parliamentary authority," etc.

Charles J. Stillé, *Life of John Dickinson*. Phila., 1894, v. 1:26 *et seq.*

The New England attitude towards slavery, secession, and matters precedent and subsequent connected therewith, was entirely in keeping with the mode of regarding things depicted in this extract from Mr. Stillé. (His whole chapter on this point is well worth reading in this connection.) Unfortunately the same tendency to turn from law to supposed natural rights has to-day infected a large portion of the community, as is made evident on every occasion by every discontented body or class of men. The tendency certainly does not make for the stability of a country.

APPENDIX 32B½

(II Page 278)

"The desire of independence is natural not only of individuals but to communities. There was a time (near 200 years [ago?]) when it was wrong to say a word agst. the dependance of the colonies upon Great Britain—a time came when it was equally wrong to enforce that dependance—The time may come & probably will come when it will be the interest of the united States to be independent of each other, but I can conceive of no temporal punishment to be severe eno' for that man who attempts to dissolve, or weaken, the union for a century or two to come." Dr. Benj. Rush (circa Dec., 1776). MS. Notes of Speeches in Congress, v. 1. (No. 71257, D, in Ridgway Library, Phila.)

"The question is to be settled which must determine whether this Government (of U. S.) is to exist for ages, or to be dispersed among contending winds." Lee's Speech in debate on permanent seat of government, in House of Representatives, September, 1789.

APPENDIX 32B¾

(II Page 284)

e g., his eulogist, Mr. Gouverneur Morris, said at his funeral, speaking to the citizens of New York, "Your favour—no your discernment . . . sent him to the convention at Philadelphia; he there assisted in forming that constitution which is now the bond of our union. . . . In signing that compact he express his apprehension that it did not contain sufficient means of strength for its own preservation; and that in consequence we should share the fate of many other republics, and pass through Anarchy to Despotism. . . . On this important subject he never concealed his opinion. . . . This generous indiscretion subjected him to misrepresentation," etc.

APPENDIX 43½

(II Page 388)

Yet though Mr. Biddle's proposition is, in the manner stated, repugnant: and inconsistent with that manly spirit which is the only safeguard of a nation, it is, one factor being eliminated, the underlying principle of secession, and tends in that direction which seems to afford the most natural promise of the growth of peace. The "right" of coercion is "the nigger on the safety-valve" of free discussion, and tends necessarily away from peace. The "right" of secession tends to reason and accommodation.

APPENDIX 46½

(II Page 395)

These United States are just now engaged in a very strenuous argument to confute, the results of such arguments as the following by Herr Treitschke (who like Count Herman is a very respectable man—for a German), viz., "Treaty rights are never absolute rights. They are of human origin, therefore imperfect and variable. There are conditions in which they do not agree with the truth of things. In such cases infringement of a right seems morally justified." (I quote from translation not having seen original.)

But if this differs in any respect save in being an abstract proposition, of which they are concrete examples, from the doctrines here laid down by eminently respectable Americans, such as Messrs. Adams, McLaughlin, Kent, Chamberlain, etc., the writer is unable to perceive it.

APPENDIX 49A

(II Page 399)

Mr. Mill might have remembered him of those passages in his essay on "Liberty," wherein he expressly limited its propriety to those nations or races fit to receive it, *e. g.*, he states

that his principle "is meant to apply to human beings only in the maturity of their faculties . . . we may leave out of account those backward states of society in which the race itself may be considered in its nonage. . . . Liberty as a principle has no application to any state of things anterior to the time when mankind have become capable of being improved by free and equal discussion," etc.

According to the opinion of his eulogist, Mr. Adams, at least, these prerequisites should disqualify the negro from the right to liberty, if they have application to any people whatever.

APPENDIX EE

(II Page 63)

Mr. Madison qualifies very mildly the proceedings of Virginia. How far she was willing to go on the road of nullification may be judged by the following:

AN ACT, to preserve the Freedom of Speech and Proceedings in the Legislature.

(Passed, December 28, 1798.)

Whereas freedom of speech and proceedings, appertaineth of right, to the General Assembly, and the preservation thereof is necessary to secure the liberty of the people:

Setcion I. Be it enacted, That if any person shall arrest or prosecute, or be aiding or abetting in arresting or prosecuting, a member or members of the Senate, or House of Delegates, for, or on account of any words spoken or written, any proposition made, or proceedings had in the said Senate, or House of Delegates, every such person so offending, shall be deemed guilty of a misdemeanor, and shall be apprehended, committed, and tried therefor, as in other cases of misdemeanors, before the general court, or a district court of this commonwealth, and being thereof convicted by the verdict of a jury, shall be adjudged to suffer imprisonment for a term not exceeding one

year, and shall pay a fine, not exceeding two thousand dollars; which imprisonment and fine shall be assessed by a jury.

Section II. And be it further enacted, That if any member or members of the said Senate, or House of Delegates, shall be arrested or imprisoned, for, or on account of any words, spoken or written, or for any proposition made, or proceedings had in the said Senate or House of Delegates, such member or members may apply to the general court, or a district court, or any judge thereof, in vacation, for a writ of Habeas Corpus, who are hereby empowered and required to issue the same, returnable before the said court, or said judge, or any other judge, and upon the return thereof, to liberate and discharge such member or members.

Section III. And be it further enacted, that the provisions of this act shall be extended to the arresting, and prosecuting any person or persons, for words spoken or written, or for any propositions made, or proceedings had in the said Senate or House of Delegates, and to, the discharging and liberating any person or persons, by habeas corpus, as aforesaid, although such person or persons, shall by disqualification, or from any other causes, have ceased to be a member of the said Senate, or House of Delegates, at the time of such arrest or prosecution, or of the trial, judgment or imprisonment, in consequence thereof: Provided, that nothing herein contained, shall in any respect extend to the power which either house of the general assembly, now hath, or may exercise over their respective members.

Section IV. This act shall commence and be in force, from and after the passing thereof.

Against whom could this Act have been aimed unless at the officials of the Federal Government?

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Abbreviations: Conv.—Convention
Ex. =Extract or
Extracts

R. =Resolution
Rat. =Ratifying
Fed. =Federal

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